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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1922~~ 1923

No. ~~505~~ 109

GUARANTY TITLE & TRUST CORPORATION, RECEIVER OF VUE DE L'EAU COMPANY, A CORPORATION, INTERVENOR, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 21, 1923.

(29,102)

(29,102)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 552.

GUARANTY TITLE & TRUST CORPORATION, RECEIVER OF VUE DE L'EAU COMPANY, A CORPORATION, INTERVENOR, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 14, 1923.

1 In the United States Court of Claims.

No. 34751.

NORFOLK-HAMPTON ROADS COMPANY, a Corporation, Claimant,

v.

THE UNITED STATES OF AMERICA.

I. Petition.

Filed December 7th, 1920.

To the Honorable Judges of the United States Court of Claims:

Your petitioner, Norfolk-Hampton Roads Company, respectfully shows as follows:

I. That your petitioner is a corporation, duly organized and existing under the laws of the State of Virginia, having its principal office in the City of Norfolk, Virginia; that its officers and stockholders are all citizens of the United States and that they and your petitioner have at all times borne true allegiance to the Government of the United States; and have not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

2 II. That theretofore and at the times hereinafter mentioned, your petitioner was the sole owner in fee simple absolute of a certain tract or parcel of land which will be designated herein as Pine Grove, situated in Tanners Creek Magisterial District of the County of Norfolk, in the State of Virginia, with the buildings thereon and all riparian and other rights and privileges thereunto belonging, said parcel of land being situated adjacent to the tract of land known as the Jamestown Exposition site on Hampton Roads, Virginia, North of Ninety-ninth Street and Algonquin Street, and being bounded as follows: On the North and West by the waters of Hampton Roads, East by the Eastern line of Maryland Avenue and South by One Hundred and Fourth Street and by property known as the Deep Water Pier property.

The said parcel of land had a frontage on Hampton Roads of about fourteen hundred (1,400) feet measured on the Shore line, and of about twenty-eight hundred (2,800) feet measured on the deep water or Pier-head line. By reason of its location, of its extensive frontage on Hampton Roads, and of the riparian rights belonging thereto, the said land was at the time of the taking thereof for the United States by the President of the United States as hereinafter set out of great value as hereinafter alleged.

III. That petitioner at the time of the taking of said land for the United States by the President of the United States was in possession of the said parcel of land and of every part thereof, and was the sole

owner thereof, having a good title of record to the greater portion thereof and a good title by adverse possession to the remainder thereof; that petitioner had at that time been in actual open, notorious, continuous and uninterrupted, exclusive and hostile possession of the whole of said parcel of land, under claim of title thereto; for more than fifteen years, to-wit, since the year 1899, and that under the statutes of the State of Virginia, in such cases
3 made and provided the title of petitioner to such portion of said parcel of land as it had not already a good title to of record, thereby became and was complete and absolute by adverse possession.

IV. That by an Act of Congress to supply urgent deficiencies in appropriations for the Military and Naval establishments approved June Fifteenth, Nineteen Hundred and Seventeen (Public Number Twenty-Three, Sixty-Fifth Congress), it is among other things, provided:

"Naval Operating Base, Hampton Roads, Virginia: The President is hereby authorized and empowered to take over for the United States the immediate possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, and including all the rights and properties of railway, electric light, power, telephone, telegraph, water and sewer companies, of the tract of land known as the Jamestown Exposition site, on Hampton Roads, Virginia, and of such lands adjacent thereto as lie north of Ninety-ninth Street and Algonquin Street, the entire property being bounded on the north and west by Hampton Roads and Willoughby Bay, on the East by Boush Creek, and on the South by Ninety-ninth and Algonquin Streets.

"That if said lands and appurtenances and improvements thereof shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five percentum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as added to said seventy-five per centum will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.
4 "Upon the taking over of said property by the President as aforesaid, the title to all property so taken over shall immediately vest in the United States."

V. That pursuant to the provisions of said Act the President of the United States by a proclamation under date of June 28th, 1917, did, on behalf of the United States, take title to and possession of the tract of land known as the Jamestown Exposition site on Hampton Roads, Virginia, and certain other lands adjacent thereto, lying north of Ninety-ninth Street and Algonquin Street, including the tract or parcel of land owned by petitioner and hereinabove described, together with the buildings thereon and the riparian rights thereunto belonging, and did at once notify your petitioner to va-

cate the said parcel of land theretofore owned by it as aforesaid by the first day of August, Nineteen Hundred and Seventeen. That on June twenty-eighth, Nineteen Hundred and Seventeen your petitioner in compliance with said demand did surrender possession, control and title to its aforesaid property to the Government of the United States, and pursuant to said order did vacate its said premises on or before said first day of August, Nineteen Hundred and Seventeen; and that thereafter the President of the United States determined that a just compensation for the property of your petitioner hereinabove described was as follows: Namely, Thirty-seven Thousand Dollars for the land and Two Thousand One Hundred and Seventy-five Dollars for the buildings thereon, or a total of Thirty-nine Thousand, One Hundred and Seventy-five Dollars.

VI. That the amount so determined by the President was and is unsatisfactory to your petitioner, which is the person entitled to receive the same. Petitioner, however, was ready and willing to receive and offered to receive from the Government of the United States, pursuant to the provisions of said Act of Congress,
5 seventy-five per centum of the amount fixed by the President as a just compensation for its property taken as aforesaid, and to sue the United States, pursuant to the provisions of the said Act, to recover such further sum as added to said seventy-five per centum would make up such amount as would be just compensation for said property. But the Government of the United States declined to pay to petitioner said seventy-five per cent of the amount so fixed as just compensation for petitioner's said property, or any part thereof, and although petitioner was deprived of the title and possession of its said property at the time aforesaid, it has received nothing whatever by way of compensation therefor.

VII. The reason assigned by the agents of the United States Government, namely, the Board on Compensation for Site Naval Operating Base, Norfolk, Va., for not paying to petitioner the said seventy-five per cent of the amount so fixed as just compensation, was that (as claimed by said agents) as to approximately one-half of said parcel of land, your petitioner had title only by adverse possession, and said agents were not satisfied that such possession had been of sufficient length of time to ripen into a measurably good title; and although said agents recognized that petitioner had a good and unimpeachable title of record to the balance of said property, they nevertheless recommended that no part of the sum fixed as just compensation for said property be paid to petitioner; but that the whole sum be "paid into the United States Court in order that the parties entitled thereto may be in position to submit appropriate evidence in substantiation of their claim to a proper share of the award."

Petitioner does not know what particular United States Court the said agents had in mind in making the said recommendation; but the amount of said award has not nor has any part thereof been paid into the District Court of the United States for the
6 Eastern District of Virginia, in which district petitioner resides and has its principal office and the said property is

located; nor, so far as petitioner knows, has it ever been paid into any Court; nor is there in the aforesaid Act any authority for such procedure. Although the United States Government took from petitioner the title to and possession of said land on June 28th, 1917, and has been in possession thereof ever since, yet said Government has not paid to petitioner or to any one for it, any compensation whatever for the possession or title to said property or any part thereof. No one except the Government of the United States has questioned petitioner's title to the said land, so far as petitioner knows, and since the said land was requisitioned and taken by the United States as aforesaid, no person other than petitioner, so far as petitioner knows, has claimed title to said land or any part thereof, or claimed to be entitled to share in the amount recoverable from the United States Government as just compensation therefor.

VIII. That no action has been taken upon this claim before Congress or any department of the United States Government, except as hereinabove expressly set forth.

IX. That the value of petitioner's said land with the improvements thereon and the riparian rights and appurtenances thereunto belonging, at the time the same was requisitioned and taken by the United States as aforesaid, was the sum of Two Hundred and Twenty Thousand, Four Hundred and Seventy-five Dollars ($220,475.00).

That your petitioner was the sole owner of said land with the improvements thereon and the riparian rights thereto belonging hereinabove mentioned and described, at the time the same was so requisitioned or taken by the United States, and that no assignment or transfer of the said claim or of any portion thereof
7 or interest therein has ever been made and that your petitioner is justly entitled to the sum hereinabove stated as the fair value of said property, to-wit, the sum of Two Hundred and Twenty Thousand Four Hundred and Seventy-five Dollars ($220,475.00), after allowing all just credits and offsets.

Wherefore, your petitioner prays judgment against the United States of America in the sum of Two Hundred and Twenty Thousand Four Hundred and Seventy-five Dollars ($220,475.00) with interest thereon from the date of the rendition of such judgment until the payment thereof. Norfolk-Hampton Roads Company, by D. H. Goodman, President. H. H. Rumble, Attorney for Petitioner, 608-614 Seaboard National Bank Building, Norfolk, Virginia. Rumble & Rumble, of Counsel for Petitioner, 608-614 Seaboard National Bank Building, Norfolk, Virginia.

UNITED STATES OF AMERICA,
Eastern District of Virginia,
City of Norfolk, ss:

Harry L. Lowenberg, being duly sworn, deposes and says that he is Secretary & Treasurer and an officer of Norfolk-Hampton Roads Company, the petitioner named in the foregoing petition; that he has read said petition and that the same is true to the best of his

knowledge, information and belief; that the reason this verification is not made by the petitioner is that the petitioner is a corporation; that the grounds for deponent's belief as to all matters stated in said petition not stated upon his own knowledge are investigations
8 which deponent has caused to be made concerning the subject matter of this action and information acquired by him in the course of his duties as an officer of the said corporation. Harry L. Lowenberg.

Subscribed and sworn to before me, a Notary Public, in and for the City of Norfolk in the State of Virginia, this 6th day of December, 1920. Susie I. Mauck, Notary Public in and for the City of Norfolk in the State of Virginia. (Seal.)

I hereby certify that under the laws of the State of Virginia no tax is required on this seal. Susie I. Mauck. My Commission expires on the 8th day of April, 1922.

II. Traverse.

Filed February 7, 1921.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

9 ## III. Intervening Petition Filed May 31, 1922, by Leave of Court.

In the United States Court of Claims.

No. 34751.

NORFOLK-HAMPTON ROADS COMPANY, a Corporation, Claimant,

v.

THE UNITED STATES OF AMERICA.

Petition of Guaranty Title & Trust Corporation, Receiver of Vue de L'Eau Company, a Corporation.

To the Honorable Judges of the United States Court of Claims:

Your petitioner, Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, a corporation, respectfully presents the following case:

1st. By a decree rendered on April 12, 1921, by the Circuit Court of the City of Norfolk, Virginia, in the chancery suit therein pending, entitled Joseph Grice, who sues on behalf of himself and all other stockholders of Vue de L'Eau Company, a corporation, who

may become parties to this suit and contribute to the cost thereof, against Vue de L'Eau Company, a corporation, and parties unknown, your petitioner was appointed a receiver for Vue de L'Eau Company, a corporation, with directions to forthwith take
10 possession of all of its property of every kind and description, and to proceed forthwith to collect all moneys to which said company may be entitled, especially all money due it from the United States of America as compensation for land formerly owned by said company and taken by the United States of America under authority of an Act of Congress approved June 15, 1917; and said receiver was authorized and directed, either in the name of the company or in its name as receiver for the company, to institute and prosecute any and all legal proceedings necessary or advisable, and to intervene in any proceedings now pending, for the purpose of making claim to and recovering any money or property to which said company might be entitled. A certified and exemplified copy of said decree is filed as a part of this petition, marked Exhibit "A."

2nd. That Vue de L'Eau Company is a corporation duly chartered, organized and existing under and by virtue of the laws of the State of Virginia, with its principal office in the City of Norfolk, Virginia.

3rd. That on June 28, 1917, and for many years prior thereto, it was the owner of a tract of land at Pine Beach in the County of Norfolk, Virginia, known as the "Prize-lot Reserve," containing about five acres, more or less, more particularly described as follows:

That certain rectangular shaped tract of land shown on a plat of survey made for and adopted by the "Board on Compensation
11 for Site, Naval Operating Base, Hampton Roads, Virginia," in October, 1917, fronting on the low water line of Hampton Roads 687 feet, more or less, and running back in a southwardly direction at right angles thereto between parallel lines a distance of 270 feet, more or less; together with all riparian rights appurtenant thereto, and extending as far out in Hampton Roads as the law allows. It being a portion of the property purchased by Vue de L'Eau Company from Edward Jordan and wife, by deed dated February 24, 1871, and is the land shown on a plat made by John F. Dezendorf in July 1873, recorded with the deed from Vue de L'Eau Company to James Y. Leigh and Theodore S. Garnett, Trustees, dated January 2, 1874, admitted to record in the Clerk's Office of the County Court of Norfolk County, Virginia, in deed book 97, pages 432, 433, except such portion thereof as had been washed away by the waters of Hampton Roads as of June 28, 1917.

4th. That by an Act of Congress approved on June 15, 1917 (Public No. 23, 65th Congress), the President of the United States was given certain power and authority therein set forth as follows:

"Naval Operating Base, Hampton Roads, Virginia: The President is hereby authorized and empowered to take over for the United States the immediate possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, and including all the rights and properties of railway, electric light, power,
12 telephone, telegraph, water and sewer companies, of the tract of land known as the Jamestown Exposition site, on Hampton

Roads, Virginia, and of such lands adjacent thereto as lie north of Ninety-ninth Street and Algonquin Street, the entire property being bounded on the north and west by Hampton Roads and Willoughby Bay, on the East by Boush Creek, and on the South by Ninety-ninth and Algonquin Streets.

"That if said lands and appurtenances and improvements thereof shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as added to said seventy-five per centum will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

"Upon the taking over of said property by the President as aforesaid, the title to all property so taken over shall immediately vest in the United States.

13 5th. That on June 28, 1917, acting under the authority of this Act of Congress, the President of the United States of America, on behalf of the United States of America, took title to and possession of the tract of land described in said Act, which included the above described tract of land owned by Vue de L'Eau Company; and on the same day the said President of the United States of America issued and published a proclamation to that effect, in which he notified all persons residing within said tract of land, or owning movable property therein, to vacate the said tract of land, and to remove therefrom all movable property prior to the first day of August, 1917. The Secretary of the Navy was further authorized and directed by the President in this proclamation to take such steps as might in his judgment be necessary for the purpose of conducting negotiations with the owners of property or rights within the said tract of land for the purpose of ascertaining the just compensation to which said owners were entitled, in order that payment therefor might be made in accordance with the provisions of the above mentioned Act of Congress approved June 15th, 1917.

6th. That as before stated the above described property owned by Vue de L'Eau Company was included within the boundaries of the above described tract of land taken by the United States of America, and the said United States of America on June 28, 1917, took title thereto and possession thereof and ousted your petitioner therefrom, and it has ever since then had possession thereof.

14 7th. That on or about November 19, 1917, a Board known as "Board on Compensation for Site, Naval Operating Base, Hampton Roads, Virginia," which had been appointed by the Secretary of the Navy in accordance with the provisions of the President's proclamation of June 28, 1917, found that the fair and reasonable value as of June 28, 1917, of a block of land known as the "Pine Grove Block," which includes the property owned by Vue de L'Eau Company, was $37,000.00 as to the land, and $2,175.00 as

to the buildings thereon, but it made no specific finding as to the value of the property owned by Vue de L'Eau Company, and which comprised nearly the entire Pine Grove Block.

8th. That the amount of said award was and is unsatisfactory to the Vue de L'Eau Company, the person entitled to receive the major part thereof, and to your petitioner as its receiver, and no part thereof has been paid either to the Vue de L'Eau Company or your petitioner as its receiver. That your petitioner is advised that the United States of America has withheld payment for said tract of land because there were doubts in the minds of the representatives of the United States of America as to who was the owner of the property and entitled to receive compensation therefor.

9th. That the value of the above described land, with riparian rights and the appurtenances thereto belonging, at the time it was taken by the United States of America, as aforesaid, was the sum of $220,000.00; that no assignment or transfer of said claim, or
15 any part thereof, or interest therein, has been made except as herein stated; that your petitioner as receiver of Vue de L'Eau Company is justly entitled to the amount herein claimed, namely, $220,000.00, from the United States of America, after allowing all just credits and offsets; that your petitioner and the said Vue de L'Eau Company have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

10th. That by virtue of the provisions of an Act of Congress approved June 15, 1917 (Public No. 23, 65th Congress), your petitioner has the right to sue the United States of America to recover this amount in the manner provided for by Section 145 of the Judicial Code.

11th. Your petitioner further alleges that on December 7, 1920, Norfolk-Hampton Roads Company, a corporation, filed its petition against the United States of America in this Court, in which it claimed to be the owner of the above described tract of land owned by Vue de L'Eau Company, and claimed that it was entitled to receive from the United States of America compensation therefor; to this petition the United States of America has filed a general traverse, and considerable evidence has been taken on the part of Norfolk-Hampton Roads Company. That proceeding has not yet been heard and determined by this Court, but is still pending before the Court.

Wherefore, your petitioner prays that it may be allowed to
16 file this petition, and to intervene in the pending petition No. 34751 filed by Norfolk-Hampton Roads Company, a corporation, against the United States of America, and now pending in this Honorable Court; that the title of Vue de L'Eau Company to the property above mentioned and described may be established and recognized by this Court; that it may be decreed that your petitioner is entitled to receive just compensation for the taking of said property; that a judgment may be rendered in favor of your petitioner against the United States of America for the sum of $220,000.00 with interest thereon as provided by law, together with its reasonable

costs in this behalf expended; and that such other, further and general relief be granted your petitioner as may be just and equitable. Guaranty Title and Trust Corporation, by A. P. Grice, President, Receiver of Vue de L'Eau Company, a Corporation, by E. R. F. Wells, Counsel.

STATE OF VIRGINIA,
City of Norfolk, To wit:

This day personally appeared before me, the undersigned, a Notary Public in and for the City and State aforesaid, A. P.
17 Grice, President of Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, a corporation, the above named petitioner, and being by me first duly sworn, says that he is President of Guaranty Title and Trust Corporation, Receiver, as aforesaid; that he has read the foregoing petition, and that the matters and things therein stated are true to the best of his knowledge and belief.

Given under my hand and notarial seal this 5th day of May, 1921. James Cabell Dabney, Notary Public.

18 **Exhibit A.**

VIRGINIA:

In the Circuit Court of the City Norfolk, on the 12th Day of April, 1921.

In Equity.

JOSEPH GRICE, Who Sues on Behalf of Himself and All Other Stockholders of Vue de L'Eau Company, a corporation, Who May Become Parties to this Suit and Contribute to the Cost Thereof,

vs.

VUE DE L'EAU COMPANY, a Corporation, and Parties Unknown.

This day came Joseph Grice, and by leave of Court filed his verified bill of complaint asking for a receiver of Vue de L'Eau Company, a corporation.

On consideration whereof, it is ordered that Guaranty Title and Trust Corporation of the City of Norfolk, Virginia, be, and it is hereby appointed a receiver for Vue de L'Eau Company, a corporation, with directions to forthwith take possession of all of the property of every kind and description belonging to said company, and to proceed forthwith to collect all moneys to which said
19 company may be entitled, especially all money which may be due it from the United States of America as compensation for land formerly owned by said company and taken and condemned by the United States of America under authority of an Act of Congress approved June 15, 1917.

For the purpose of obtaining possession of the company's prop-

erty and of collecting the moneys to which it may be entitled, the said receiver is hereby authorized and directed, either in the name of the company or in its name as receiver for the company, to institute and prosecute any and all legal proceedings which may be necessary or advisable, and to intervene in any proceedings now pending, or which may hereafter be instituted in any courts, State or Federal, for the purpose of making claim to and recovering any money or property to which said company may be entitled.

The said receiver is directed to hold, subject to the further order of this Court, all property and money belonging to said company which may come into its hands as receiver; and it is hereby empowered to do any and all things necessary, proper or convenient to exercise the powers hereby conferred upon it.

But the said receiver shall exercise no powers under this order until it shall have executed a bond before the Clerk of this Court in the penalty of $50,000.00, payable to the Commonwealth
20 of Virginia, conditioned for the faithful discharge of its duties as such receiver.

A Copy. Teste. Laurence Waring, Clerk, by A. M. Brown, D. C.

I hereby certify that the bond required by the foregoing order has been duly executed by Guaranty Title and Trust Corporation. A. M. Brown, Deputy Clerk of the Circuit Court of the City of Norfolk, Virginia.

STATE OF VIRGINIA,
City of Norfolk, To wit:

I, Laurence Waring, Clerk of the Circuit Court of the said City of Norfolk and State of Virginia, do hereby certify that the foregoing and annexed copy of decree appointing Receiver in the chancery cause of Joseph Grice, &c., complainant, vs. Vue de L'Eau Company, a corporation, &c., defendant, is a true abstract from the Records of said Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, this 12th day of April, A. D. 1921, in the 145th year of the Commonwealth of Virginia. (Signed) Laurence Waring, Clerk. (Seal.)

21 STATE OF VIRGINIA,
City of Norfolk, To wit:

I, Allan R. Hanckel, Judge of the Circuit Court of the said City of Norfolk, in the State of Virginia, do certify that Laurence Waring, who hath given the preceding certificate, is Clerk of the said Court, and that his said attestation is in due form.

Given under my hand this 12th day of April, A. D. 1921. (Signed) Allan R. Hanckel, Judge of the Circuit Court of the said City of Norfolk.

STATE OF VIRGINIA,
City of Norfolk, To wit:

I, Laurence Waring, Clerk of the said Court of the said City of Norfolk, and State of Virginia, do hereby certify that Hon. Allan R. Hanckel, whose genuine signature appears to the Certificate above, is the only Judge of the said Court, and that all his official acts as such are entitled to full faith and credit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, this 12th day of April, A. D. 1921, in the 145th year of the Commonwealth of Virginia. (Signed) Laurence Waring, Clerk. (Seal.)

22 **IV. Argument and Submission of Case.**

On May 22, 1922, this case was argued and submitted on merits by Mr. H. H. Rumble, for the plaintiff, Mr. E. R. F. Wells, for the intervenor, and Mr. Frank B. Crosthwaite, for the defendant.

23 **V. Findings of Fact and Conclusion of Law.**

[Filed June 26, 1922.]

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff, the Norfolk-Hampton Roads Company is a corporation, organized and existing under the laws of the State of Virginia, and has at all times borne true allegiance to the Government of the United States. The intervenor in this suit, the Guaranty Title and Trust Corporation, receiver of the Vue de L'Eau Company, is a corporation organized and existing under the laws of the State of Virginia, and is the duly appointed receiver of the said Vue de L'Eau Company, which company has at all times borne true allegiance to the Government of the United States.

II.

On and prior to June 28, 1917 the plaintiff company was in possession of a certain tract or parcel of land designated as Pine Grove, situated in Tanners Creek Magisterial District of the County of Norfolk, State of Virginia, with all riparian and other rights appurtenant thereto, said parcel of land being adjacent to the tract of land known as the Jamestown Exposition Site, on Hampton Roads, Virginia, lying north of Ninety-Ninth Street and Algonquin Street, and being bounded as follows: On the north and west by the waters of Hampton Roads; on the east by the eastern line of Maryland Avenue; and on the south by One Hundred and Fourth Street and

property known as the Deep Water Pier property, said parcel of land containing an area of 9.22 acres, more or less, and having a frontage of approximately 1,400 feet on the shore line.

All of said parcel of land is located within the area described in the Act of Congress approved June 15, 1917, 40 Stat., 207; and said land, with the appurtenances and riparian rights belonging thereto, was taken by the President of the United States on June 28, 1917, under and pursuant to the terms of said Act of Congress, possession and control of said land being surrendered by plaintiff company to the United States on or before August 1, 1917. Thereafter,
24 the President of the United States, acting pursuant to said Act of Congress, determined that just compensation for said parcel of land, including appurtenances and riparian rights belonging thereto, but exclusive of buildings thereon not belonging to the owners of the land, was the sum of $37,000. Said sum was unsatisfactory to plaintiff company, and the payment of 75 per cent of said sum, as provided for by said Act of Congress, was requested by plaintiff company, but the United States would make no payment whatever on said land on account of there being a question as to the validity of said company's title to a portion of said parcel of land, known as the Prize Lot Reserve, consisting of 4.55 acres, more or less, with a frontage of about 690 feet on Hampton Roads.

III.

The said parcel of 9.22 acres of land described in Finding II had for several years immediately prior to the year 1874 belonged to the Vue de L'Eau Company, a company incorporated under the laws of the State of Virginia, being a part of a tract of about 294 acres of land owned by said company; and ownership of said parcel, with the exception of the said portion of it known as the Prize Lot Reserve, was acquired by the plaintiff, the Norfolk-Hampton Roads Company, together with a large acreage of contiguous and adjacent lands, by purchase, about the year 1899, which ownership continued until said parcel of land was taken by the United States Government on June 28, 1917, as aforesaid.

The portion of said parcel of land so acquired by plaintiff company by purchase was 4.67 acres, more or less, with a frontage of approximately 710 feet on Hampton Roads.

IV.

The said Prize Lot Reserve was located approximately midway of the Hampton Roads front of the said parcel of 9.22 acres of land described in Finding II, and for which recovery is sought in this suit. It may be more particularly described as follows, the evidence not furnishing a more definite description of it:

A certain rectangular shaped tract of land shown on a plat of survey made for and accepted by the "Board on Compensation for Site, Naval Operating Base, Hampton Roads, Virginia," in October,
1917, fronting on the low water line of Hampton Roads ap-
25 proximately 690 feet, and running back in a southwardly

direction at right angles thereto, between parallel lines, a distance of 270 feet, containing 4.55 acres, more or less, together with all riparian rights appurtenant thereto, and extending -s far out into Hampton Roads as the law allows.

Said Prize Lot Reserve consisted of lots and streets laid out by the said Vue de L'Eau Company about the year 1873, there being 16 lots fronting on Hampton Roads and 40 lots fronting on streets to the rear of the water front lots. In January, 1874, the said Vue de L'Eau Company executed a deed of assignment for the benefit of its creditors,whereby it conveyed to trustees under the assignment all of its lands and other property except the land embraced in the said Prize Lot Reserve. So far as appears from the land records of said Norfolk County, the only sales or conveyance of lots or lands of said Prize Lot Reserve ever made by said company were the sales and conveyance to different persons, not parties to this suit, under date of August 1, 1873, of seven of said lots, two of which were water-front lots "D" and "H", each having a frontage of 30 feet on Hampton Roads and a depth of 130 feet; and the other five of which were lots Nos. 2, 6, 19, 26 and 35, each having a width of 25 feet and a depth of 130 feet.

V.

After its said assignment for the benefit of its creditors in 1874, the said Vue de L'Eau Company apparently became dormant, no organization in the way of board of directors and officers being kept up; but no formal dissolution of the company or surrender of its charter appears ever to have taken place, and the legal existence of the company has recently been recognized by the Virginia courts by the appointment, by decree of April 12, 1921, of the intervenor in this suit, the Guaranty Title and Trust Corporation, as receiver of said company, with authority to take charge of the property of the company and to prosecute any claim or suits for the protection of its rights and interests.

VI.

No action with reference to the land and lots comprising the said Prize Lot Reserve appears to have been taken by or in behalf of the said Vue de L'Eau Company from the time of the company's said assignment in 1874 for the benefit of its creditors until the appointment of a receiver for the company in April, 1921, as set forth in Finding V, and the receiver's intervention in this suit shortly thereafter, during said year 1921; and the said land and lots were allowed to remain in their former condition and to further develop forest growth thereon.

VII.

The said Prize Lot Reserve was inclosed on its land sides by a large acreage of land belonging to the plaintiff company, purchased by it in 1899, which included the said 4.67 acres immediately surrounding said Prize Lot Reserve, and involved in this suit; and upon

purchasing said lands the plaintiff company, without any right, title or interest, or claim of right, title or interest, in or to the lots or land of said Prize Lot Reserve, and with full knowledge of the fact that it had no claim of right, title or interest in or to any part of said lots or land, deliberately set about trying to acquire title to said lots and land by adverse possession; and in the course of its efforts to so acquire title thereto, the following action was taken:

The plaintiff company, upon its purchase, in 1899, of its large holdings of land inclosing said Prize Lot Reserve on its land sides, took possession of said holdings and from thenceforward to the time of its taking by the Government *on* June, 1917, treated the land of said Reserve as though it belonged to the plaintiff company. It recorded plats of its said property in which the land of said Reserve was included and indicated as a part of the company's holdings. The company's advertising matter issued in 1899 indicated as belonging to the company lands which included the lands of said Reserve, and isad land was included in the company's subdivision known as "Subdivision No. 1, Norfolk on the Roads", a plat of which, stating said subdivision to be the "Property of Norfolk-Hampton Roads Company," was recorded in the County Clerk's office on June 14, 1901. In the development of its said property, streets were opened and graded through the land of said Reserve; timber was cut therefrom and used or marketed by the company; and bulkheads were built by the company in front of the property to protect it from erosion by the waves and tides. Said company also leased an area of its lands to the Jamestown Exposition Company in 1907, including therewith said Prize Lot Reserve land as belonging to plaintiff company, and thereafter, upon the termination of the Exposition Company's lease, said lands were leased by plaintiff company to another tenant, by whom they were occupied for some time. And in general, the land
27 of said Reserve was held out and treated by plaintiff company as being the property of said company. It does not statisfactorily appear who, if anyone, paid the taxes on said land between the years 1874 and 1917.

VIII.

The said 4.67 acres of land acquired by plaintiff, the Norfolk-Hampton Roads Company, in 1899, and constituting a part of the parcel of 9.22 acres for which recovery is sought in this suit, was worth the sum of $35,500.00, when it was taken by the United States on June 28, 1917.

IX.

The portion of the said 4.55 acres of the said Prize Lot Reserve, with the appurtenances and riparian rights belonging thereto, which remained to the said Vue de L'Eau Company after its sale and conveyance of said seven lots in August 1874, was worth the sum of $33,000.00 when it was taken by the United States on June 28, 1917.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as conclusions of law, that the plaintiff, the Norfolk-Hampton Roads Company, is entitled to recover the sum of $68,500.00 for the land of this value described in Findings VIII and IX; and that the intervenor, the Guaranty Title and Trust Corporation, Receiver, is not entitled to recover.

It is therefore adjudged and ordered that the plaintiff, the Norfolk-Hampton Roads Company, recover of and from the United States the said sum of sixty-eight thousand five hundred dollars ($68,-500.00), the judgment to be suspended until said plaintiff shall file with the Attorney General of the United States a good and sufficient deed, approved by the Attorney General, conveying to the United States the said land described in Findings VIII and IX as worth said sum of $68,500.00.

And it is further adjudged and ordered that the petition of the intervenor, the Guaranty Title and Trust Corporation, Receiver, be dismissed, with judgment against said intervenor, in favor of the United States, for such part of the cost of printing the record in this cause as is properly chargeable to the intervenor, the amount thereof to be entered by the Clerk and collected by him according to law.

28 **VI. Judgment of the Court.**

At a Court of Claims held in the City of Washington on the 26th day of June, A. D., 1922, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the plaintiff, and, *and* do order, adjudge and decree that the Norfolk-Hampton Roads Company, as aforesaid, is entitled to recover of and from the United States the sum of Sixty-eight thousand and five hundred dollars ($68,500.), the judgment to be suspended until said plaintiff shall file with the Attorney General of the United States a good and sufficient deed, approved by the Attorney General, conveying to the United States the said land described in Findings VIII and IX as worth said sum of $68,500.00.

And it is further ordered adjudged and decreed that the perition of the intervenor, the Guaranty Title and Trust Corporation, receiver, be dismissed, with judgment against said intervenor, in favor of the United States, for such part of the cost of printing the record in this cause as is properly chargeable to the intervenor, the amount of which is One hundred and five dollars and thirty-nine cents ($105.39) to be collected by the Clerk, as provided by law. By the Court.

VII. Intervenor's Application for and Allowance of an Appeal.

[Filed July 31, 1922.]

The above-named Intervenor, Guaranty Title & Trust Corporation, Receiver of Vue de L'Eau Company, a corporation, conceiving itself aggrieved by a judgment rendered in the above-entitled cause on the 26th day of June, 1922, hereby makes application for, and gives notice of, an appeal from said judgment to the Supreme Court of the United States, and it prays that its appeal may be allowed; and that a transcript of the record, and proceedings and papers upon which said judgment was made, together with the findings of fact and conclusion of law of this Honorable Court, duly authenticated, may be sent to the Supreme Court of the United States. E. R. F. Wells, Attorney for Guaranty Title & Trust Corporation, Receiver for Vue de L'Eau Company, Intervenor. Wm. Leigh Williams, E. R. F. Wells, Counsel for Intervenors.

29 Filed July 31, 1922.

Ordered: That the above appeal be allowed as prayed for on the usual record. George E. Downey, Judge. August 1, 1922.

[Title omitted.]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusions of law; of the judgment of the Court; of the application of the Intervenor, the Guaranty Title and Trust Corporation, for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Third day of August, A. D., 1922. F. C. Kleinschmidt, Assistant Clerk Court of Claims. [Seal of Court of Claims.]

Endorsed on cover: File No. 29,102. Court of Claims. Term No. 552. Guaranty Title & Trust Corporation, receiver of Vue de L'Eau Company, appellant, vs. The United States. Filed August 21st, 1922. File No. 29,102.

AUG 21 19
WM. R. STANS

Supreme Court of the United States

October Term 1923

No. 109

GUARANTY TITLE & TRUST CORPORATION,
Receiver of VUE DE L'EAU COMPANY,
a corporation, Intervenor, Appellant

v.

THE UNITED STATES.

BRIEF ON BEHALF OF APPELLANT

E. R. F. WELLS,
Attorney for Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company.

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a corporation, Intervenor, Appellant

v.

THE UNITED STATES.

BRIEF ON BEHALF OF APPELLANT

STATEMENT OF THE CASE.

On the 28th day of June 1917, acting under authority of an Act of Congress approved on June 15, 1917, (Public No. 23, 65 Congress) the President of the United States of America, on behalf of the United States of America, took title to and possession of a large tract of land described in the Act, situate on Hampton Roads, in the State of Virginia, and ever since then the United States of America has been in exclusive possession of it.

This tract of land included a parcel of land containing 9.22 acres, more or less, having frontage of approximately 1400 feet on the water, which was claimed by Norfolk-Hampton Roads Company.

A board known as "Board on Compensations for Site, Naval Operating Base, Hampton Roads, Virginia," appointed by the Secretary of the Navy in accordance with the President's proclamation of June 28, 1917, made a report in which it found that the fair value of this parcel of 9.22 acres, known as the "Pine Grove Block", was $37,000.00. This sum was unsatisfactory to Norfolk-Hampton Roads Company, and it requested the payment of seventy-five per cent. of that amount as provided for by said Act of Congress, but the United States would make no payment whatever on this parcel of land because there was a question as to the validity of said Company's title to a portion of this parcel known as the "Prize Lot Reserve", consisting of 4.55 acres, more or less, with a frontage of about 690 feet on Hampton Roads. (R. 12).

Thereupon on December 7, 1920, the Norfolk-Hampton Roads Company filed its petition in the United States Court of Claims against United States of America, claiming that it was the owner of this parcel of 9.22 acres, and entitled to receive compensation therefor. (R. 1-5). In this petition the Norfolk-Hampton Roads Company alleges that it has a good title of record to a large portion of this parcel of land, and "a good title by adverse possession" to the remainder thereof. (R. 2). It further alleges (R. 3) that the reason assigned by the Board of Compensation for Site for not paying to it seventy-five per cent.

of the amount fixed as the value of the land, was that as to approximately one-half of said parcel of land said Company had title only by adverse possession, and that the Board was not satisfied that such possession had been of sufficient length of time to ripen into a measurably good title.

While this petition was pending in the Court of Claims, to-wit, on the 12th day of April, 1921, the Circuit Court of the City of Norfolk, Virginia, in a suit brought by a stockholder of the Vue de L'Eau Company, a Virginia Corporation, suing on behalf of himself and other stockholders, appointed the Guaranty Title and Trust Corporation the Receiver of the Vue de L'Eau Company, and directed it to collect and take charge of all property belonging to the Vue de L'Eau Company, with power to intervene in any proceeding pending in other Courts for the purpose of making claim to and recovering the property of said Company, or its value. (R. 9-10).

Pursuant to this authority the Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, on the 31st day of May, 1921, by leave of Court filed its petition in the Court of Claims in the cause which had been instituted by Norfolk-Hampton Roads Company against the United States. (R. 5-9). In this intervening petition it claimed that the Vue de L'Eau Company was a Virginia Corporation, with its principal office in the City of Norfolk, Virginia; that it was the owner of the parcel of land known as the "Prize Lot Reserve," containing about five acres lying on Hampton Roads, it being a portion of the property purchased by the Vue de L'Eau Company in 1871;

that this property, along with other property, had been taken by the President of the United States under authority of the Act of Congress approved June 15, 1917, and that the petitioner as Receiver of Vue de L'Eau Company was entitled to receive just compensation therefor; that Norfolk-Hampton Roads Company had instituted proceedings in the Court of Claims against the United States in which it claimed to be the owner of this parcel of land and entitled to receive compensation therefor. The petitioner asked leave to intervene in said proceedings and prayed that the title of Vue de L'Eau Company to said parcel of land be recognized by the Court and that it be allowed just compensation therefor.

The point in controversy between the appellant as Receiver of Vue de L'Eau Company and the Norfolk-Hampton Roads Company, was the ownership of this parcel of land containing 4.55 acres. It was conceded that the Vue de L'Eau Company had the record title to this land, but the Norfolk-Hampton Roads Company claimed that it had acquired title thereto by adverse possession.

Considerable evidence was taken on behalf of each party, briefs were filed, and on May 22, 1922, the case was argued before the Court of Claims and submitted on its merits. (R. 11).

On June 26th, 1922, the Court of Claims announced its Findings of Fact and Conclusions of Law, and rendered judgment in favor of Norfolk-Hampton Roads Company, and dismissed the petition of the Receiver of Vue de L'Eau Company. (R. 11-15).

In its "Findings of Fact" the Court found that prior to the year 1874, the entire parcel of 9.22 acres belonged to the Vue de L'Eau Company, a Virginia Corporation; that in January, 1874, this Company executed a deed of assignment for the benefit of its creditors whereby it conveyed to certain trustees all of its land except the land embraced in said "Prize Lot Reserve," containing 4.55 acres; and that with the exception of seven lots sold by the Vue de L'Eau Company in 1873, it had the record title to the "Prize Lot Reserve;" that in the year 1899 the Norfolk-Hampton Roads Company purchased the parcel of 9.22 acres of land, *with the exception of the said portion of it known as the "Prize Lot Reserve,"* containing 4.55 acres, and also purchased a large acreage of adjacent land.

In other words, the Court of Claims found that the Norfolk-Hampton Roads Company had acquired by purchase 4.67 acres of the parcel of 9.22 acres, and that the Vue de L'Eau Company had the *record title* to the remainder of said parcel containing 4.55 acres, at the time the property was taken by the United States, but that the Norfolk-Hampton Roads Company had acquired title thereto by adverse possession.

In Finding VII. (R. 13-14) the Court sets forth the acts done by Norfolk-Hampton Roads Company to acquire title by adverse possession.

The Court further found (see Finding IX–R. 14) that the portion of the said 4.55 acres of the "Prize Lot Reserve" which remained to the Vue de L'Eau Company after it had sold the seven lots already

mentioned, was worth the sum of $33,000.00 on June 28, 1917, when it was taken by the United States.

Upon these "Findings of Fact" the Court of Claims decided "as conclusions of law" that the Norfolk-Hampton Roads Company was entitled to recover the value of the entire parcel of 9.22 acres, which, as already stated, included the "Prize Lot Reserve," and that the Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, was not entitled to recover the value of the "Prize Lot Reserve," viz., $33,000.00. (R. 15).

It therefore rendered a judgment in favor of the Norfolk-Hampton Roads Company for $68,500.00, the value of the entire tract of 9.22 acres, and dismissed the petition of the Receiver of the Vue de L'Eau Company.

On July 31, 1922, the Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, made application for an appeal from this judgment, and on August 1, 1922, an appeal was allowed. (R. 16).

SPECIFICATION OF ERRORS.

The appellant assigns the following errors to the decision and judgment of the Court of Claims:

(1) In deciding as a conclusion of law from the Findings of Fact, that Norfolk-Hampton Roads Company acquired title by adverse possession to that portion of the 4.55 acres of land known as "Prize Lot Reserve," which was claimed by Vue de L'Eau Company and to which it had the record title.

(2) In deciding as a conclusion of law from the Findings of Fact that Norfolk-Hampton Roads Company was the owner, and as such was entitled to recover the sum of $33,000.00 as the value of the above mentioned parcel of land described in Finding IX.

(3) In deciding as a conclusion of law from the Findings of Fact that the Vue de L'Eau Company was not the owner of said parcel of land described in Finding IX and that its Receiver was not entitled to recover its value, viz., $33,000.00, and in dismissing the petition of said Receiver and rendering a judgment for costs against it.

(4) In failing to decide as a conclusion of law from the Findings of Fact that the Vue de L'Eau Company was the owner of the said parcel of land and that its Receiver was entitled to recover its value, viz., $33,000.00.

ARGUMENT.

The question presented in this case is: Who was the owner of a parcel of land known as the "Prize Lot Reserve," containing 4.55 acres, less seven lots already sold, on June 28, 1917, when said parcel of land was taken by the United States?

The true owner, whoever it may be, is entitled to recover of the United States the sum of $33,000.00, the valuation placed by the Court of Claims upon said parcel of land.

It is conceded that the Vue de L'Eau Company acquired title to this land and became the fee simple

owner thereof prior to 1874, and that on June 28, 1917, it was still the fee simple owner (except as to seven lots sold in the year 1873) unless the Norfolk-Hampton Roads Company had in the meanwhile acquired title thereto by adverse possession.

So, the fundamental question to be decided is: Did the Norfolk-Hampton Roads Company acquire title to this parcel of land by adverse possession?

In the second paragraph of Finding VII (R. 14) the Court sets forth the acts done by Norfolk-Hampton Roads Company in its efforts to acquire title to this land by adverse possession.

We quote the language of the Court, but for the purpose of convenient discussion we have adopted our own arrangement and have lettered each separate act:

> "The plaintiff company (*i. e.* Norfolk-Hampton Roads Company) upon its purchase in 1899, of its large holdings of land inclosing (*i. e.* surrounding) said Prize Lot Reserve on its land sides, took possession of said holdings and from thenceforward to the time of its taking by the Government on June, 1917, treated the land of said Reserve as though it belonged to the plaintiff company.
>
> (a) It recorded plats of its said property in which the land of said Reserve was included and indicated as a part of the company's holdings.
>
> (b) The company's advertising matter issued in 1899 indicated as belonging to the company lands which included the lands of said

Reserve, and said land was included in the company's subdivision known as "Subdivision No. 1, Norfolk on the Roads," a plat of which stating said subdivision to be the "Property of Norfolk-Hampton Roads Company," was recorded in the County Clerk's office on June 14, 1901.

(c) In the development of its said property, streets were opened and graded through the land of said Reserve;

(d) timber was cut therefrom and used or marketed by the company;

(e) and bulkheads were built by the company in front of the property to protect it from erosion by the waves and tides.

(f) Said Company also leased an area of its lands to the Jamestown Exposition Company in 1907, including therewith said Prize Lot Reserve land as belonging to plaintiff company,

(g) and thereafter, upon the termination of the Exposition Company's lease, said lands were leased by plaintiff company to another tenant, by whom they were occupied for some time.

(h) And in general, the land of said Reserve was held out and treated by plaintiff company as being the property of said company. It does not satisfactorily appear who, if anyone, paid the taxes on said land between the year 1874 and 1917."

While the Court of Claims did not *expressly* decide that these acts constituted adverse possession sufficient to vest title to the land in the Norfolk-Hampton Roads Company, still it inferentially decided this, because otherwise that Company would not have been entitled to recover the value of the "Prize Lot Reserve." In other words, before the Court of Claims could render judgment in favor of the Norfolk-Hampton Roads Company for the value of this land, it must have decided that it was the owner of the land and had acquired title thereto by adverse possession.

It therefore sufficiently appears that the Court of Claims decided that the acts set forth in Finding VII constituted actual adverse possession sufficient to vest title under the Virginia law. In this, we respectfully submit, the Court erred.

It is the appellant's contention that the conclusion of the Court of Claims is not justified by its Findings of Fact, but on the contrary, these Findings of Fact lead irresistibly to the conclusion of law that the Norfolk-Hampton Roads Company did not acquire title to this land by adverse possession under the Virginia law which governs this case.

It therefore becomes necessary to inquire into the Virginia law as to adverse possession and its constituent elements.

Section 2917 Va. Code (1887), now Sec. 5805 Va. Code (1919), is as follows:

> "*Limitation of entry on or action for land.*—No person shall make an entry on, or bring an action to recover, any land lying east of the

> Alleghany mountains, but within *fifteen years*, or any land lying west of the Alleghany mountains, but within ten years, next after the time at which the right to make such entry or bring such action shall have first accrued to himself or to some person through whom he claims. For the purposes of this section the county of Carroll shall be held and considered as lying wholly west of the Alleghany mountains."

While this statute does not in express words refer to adverse possession, it has been uniformly construed to mean that in order to bar the true owner's right of action to recover his land, the disseisor must have been in actual, uninterrupted, adverse possession thereof for a period of fifteen years in this section of Virginia.

Or, to state the matter differently, a disseisor cannot acquire title to land except by actual, uninterrupted, adverse possession thereof for a period of fifteen years.

In *Hollingsworth* v. *Sherman*, 81 Va. 571, the Virginia Court said:

> "This possession, however, to bar the plaintiff's right of entry must continue, not only through the period of statutory limitation, but it must be of the quality and character which the law requires. It must be uninterrupted, honest and adverse. Such possession for the period prescribed by the statute, not only gives a right of possession which cannot be divested by entry, but also gives a right of entry and of action, if the party is plaintiff, which will enable him to recover, even against the strongest proof of title, which, independently of such continued

> adversary possession, would be a better title. This possession must be adverse, grounded upon an ouster or dispossession of the real owner; a possession under claim of title, is in reference to conflicting claims and the statutory prescriptive bar; it must consist of an *actual, exclusive, continued, visible, notorious, and hostile possession under a colorable claim of title.*"

Professor Minor, the great authority on Virginia land law, says: "In order that possession may have the effect of barring the entry, etc., of a claim, it must be long, uninterrupted, honest and adverse." Again, he says:

> "Hence, to constitute an adverse possession, there must be a *possession under claim of title;* or in reference to conflicting claims, and the statutory prescriptive bar, it must consist of an *actual, exclusive, continued, visible, notorious, and hostile* possession, under a colorable claim of title."

2 Min. Inst. (4th ed.) 577-580.

Professor Graves, of the University of Virginia, in his work on Real Property, thus states the effect of this statute:

> "*Effect of the Statutes.*—It must be remembered that no owner of land can be barred of his title unless he has been *put to his entry or action* for the statutory period, and this cannot be unless the owner is out of possession of his land with a claimant in the possession of it,

holding it *adversely* to the owner. *Such claimant must be in adverse possession.*"

Graves on Real Property, Sec. 138.

In the following section this eminent jurist states the essential elements of adverse possession:

"*What is Adverse Possession of Land?*—In order to be *adverse*, the defendant's possession must be (1) actual: (2) open and notorious; (3) exclusive; (4) in defiance of and hostile to the true owner (plaintiff); (5) and with *claim of title in himself. Taylor* v. *Burnsides*, 1 Gratt. (165) (190); *Andrews* v. *Roseland, etc., Co.*, 89 Va. 393; *Core* v. *Faupel*, 24 W. Va. 238; *Sharon* v. *Tucker*, 144 U. S. 533; 1 Am. & Eng. Ency. Law (2nd ed.) 789. And to bar the owner, such adverse possession must continue *without interruption* for the statutory period. Let us examine these requisites in their order."

Graves on Real Property, Sec. 139.

While the Findings of Fact show that the Norfolk-Hampton Roads Company at times exercised certain acts of ownership over this land, they fail to show that said Company was in actual, uninterrupted, adverse possession thereof for a period of fifteen years, which is necessary under the Virginia law in order to acquire title.

We submit that two of the essentials of adverse possession were not present: (1) Prior to 1907 it was never in actual possession of this land; and (2) at no time did it have a claim of right or title thereto.

In the year 1899 the Norfolk-Hampton Roads Company purchased land adjoining the parcel of land in controversy. It claims that shortly after this purchase it began exercising acts of ownership over the disputed parcel to which it had no title whatsoever. This parcel of land was taken by the United States on June 28, 1917. Therefore, in order to have acquired title to this land by adverse possession, it was necessary under the Virginia law for the Norfolk-Hampton Roads Company to show that it was in actual, uninterrupted, adverse possession thereof for at least fifteen years prior to June 28, 1917. This possession must have been actual, continuous and uninterrupted during that period of time.

And it must be borne in mind that the burden rests on the party claiming title to land by adverse possession to prove clearly all of the essential elements of adverse possession.

In *Parkersburg Co.* v. *Schultz* (W. Va.) 27 S. E. 255, 256, it is said:

> "Here we must first note that, as it defeats the true title, adversary possession must be taken strictly, and the facts to sustain it proven clearly."

And again:

> "A party relying on adverse possession must show clearly all the requirements of the doctrine."

In *Sims* v. *Capper*, 133 Va. 278-286, it is said:

> "The claim of title is as essential as the possession, in order to constitute adversary

possession; and the burden of proof to show both is upon those asserting the acquisition of title by such possession whether with or without color of title."

Let us now examine some of the Virginia decisions on the subject of what constitutes actual possession.

What Constitutes Actual Possession:

The leading case in Virginia on the subject of adverse possession is *Taylor* v. *Burnsides*, 1 Gratt. (42 Va.) 165. For more than three-quarters of a century the rulings in this case have been regarded and revered in Virginia as canons of the law of real property. In that case Judge Baldwin said (page 192):

> "An adversary possession must also be actual, in reference to the means by which it is acquired. In that sense, I understand an actual possession to be the occupation, use or enjoyment of the subject matter of controversy, by residence, cultivation, improvement, or other open, notorious and habitual acts of ownership. Of these modes of occupation, use or enjoyment, residence, cultivation, and improvement, respectively, while they continue, are usually the most obvious and decisive."

Further on (page 198) in his opinion he says with reference to wild and uncultivated lands such as this land:

> "It follows from what has been said, that wild and uncultivated lands cannot be made the

> subjects of adversary possession, while they remain completely in a state of nature. A change in their condition, to some extent, is therefore essential; and the acts by which it is effected are often the strongest evidence of actual possession. Without such change, accomplished or in progress, there can be no residence, cultivation or improvement, no occupation, use or enjoyment. Evidence short of this may prove an adversary claim; but, in the nature of things, cannot establish an adversary possession. Nor is there any reason for relaxing the rules of law on this subject, in behalf of the adversary claimant of such property. There ought to be no presumption in his favor against the better title. *It is in vain for him to say, that he has had all the possession of which the property was then susceptible; for that would lead to a constructive possession, which is only attributable to the rightful owner.*"

And still further on (page 201) he says:

> "There can be no ouster of the constructive possession of the older patentee, but by an actual adversary possession; and of this wild and uncultivated lands, completely in a state of nature, are not susceptible. An adversary possession of them can only be acquired by acts producing a change in their condition."

In enumerating some of the acts not sufficient for this purpose, he says (pages 206, 207):

> "Payment of taxes, prohibition of trespasses, surveys of the land, sales and convey-

> ances of it; though they may serve to show a claim of title, are not evidence of actual possession. Even the cutting and selling of timber by the tenant himself, or by his authority, is but a transient trespass, unless habitual."

This case has been repeatedly and consistently followed in Virginia.

In the case of *Harman* v. *Ratliff* (1893) 93 Va. 249, 253, it is said:

> "While lands remain uncleared, or in a state of nature, they are not susceptible of adverse possession against the older patentee, unless by acts of ownership effecting a change in their condition, and to constitute adverse possession there must be occupancy, cultivation, improvement or other open, notorious, and habitual acts of ownership."

In the *City of Richmond* v. *Jones* (1910) 111 Va. 214, 217, it was claimed that because the property in question was not capable of being cultivated, that this constituted an excuse for not actually occupying it, and that under these circumstances actual occupancy was not necessary to constitute adverse possession. But the Court overruled this contention, and President Keith, in delivering the opinion of the Court, said on this point:

> "Surely the proof of absence of occupancy and improvement by fencing, cultivation or otherwise, however good or sufficient the reason for not building, or not fencing, or not cleaning or performing any other act of ownership may

> be, cannot prove or tend to prove a claim by adversary possession. If it were otherwise, it is conceivable that lands remaining in a state of nature might be recovered by adversary possession, or the possession might be retained against the older patentee by proving, item by item, and circumstance, a plausible excuse to the jury for the failure to do or perform this or that act essential to adversary possession."

In *Whealton* v. *Doughty* (1911), 112 Va. 649, this ruling was made:

> "If title by adverse possession can be acquired of marsh lands on the seashore, separate and distinct from the rights of the riparian owner, the mere fact that the adverse claimant and his predecessors in title permitted their cattle to roam over said marshes when not covered by water, just as they roamed over adjacent marsh lands, and that they cut grass from the marsh lands and hauled it away for use as manure on their highlands, does not constitute such actual possession as will deprive the true owner of his title."

In Providence etc., Club v. *Miller Manufacturing Co.* (1915) 117 Va. 129, it was held that fishing and hunting on a pond, renting boats to others to fish and hunt thereon and instructing one's agent not to permit others to boat or fish on the pond without the principal's permission, were not such acts of adverse possession as would confer title as against an adjacent owner who used the pond for boating and fishing whenever he desired to do so.

Perhaps the most recent Virginia decision on this precise question is *Craig-Giles Iron Co.* v. *Wickline*, 126 Va. 223, decided on November 20, 1919. Judge Kelly, in delivering the opinion of the court, reviews the principal previous Virginia cases on the subject. In that case it appeared that the parties who claimed title by adverse possession had cut and sold timber from the land at various times, and had attempted to convey portions of the land; that they claimed to be owners of the land, and were generally reputed in the neighborhood to be the owners of it; that the land was assessed on the land books in their names, and taxes on it paid by them, and that they had forbidden trespassing thereon. The court decided that while such evidence made out a case of continuous *claim* to the land, it was wholly insufficient " to establish title thereto by *adverse possession.*"

Judge Kelly, in delivering the opinion of the court, said:

> "The additional acts of paying taxes, asserting title and forbidding trespasses do not aid a situation like this. The primary fact of actual possession must first be established. When this is done, proof of such additional acts is admissible, not as showing the possession itself, but as showing its good faith, exclusiveness, notoriousness and hostility."

In *Chilton* v. *White*, 72 W. Va. 545, 78 S. E. 1048, it is said:

> "Occasional cutting of timber on, and ranging cattle over, wild and unclosed land is not

such occupation of it as will amount to adverse possession."

In *Core* v. *Faupel*, 24 W. Va. 238, it is said:

> "The most usual and decisive acts of actual possession are occupation, residence, cultivation, enclosure, and improvement."

It will be observed from the "Findings of Fact" that prior to 1907 no portion of this land was enclosed; no portion of it was occupied by anyone; no portion of it was in cultivation, but practically all of it was in forest growth, and there were no buildings or improvements of any kind on it. These are the usual and decisive acts of actual possession and yet none of them was present prior to 1907. In fact, in Finding VI, it is said that from 1874 until the appointment of a receiver, in 1921, the Vue de L'Eau Company took no action with reference to this land and "the said land and lots were allowed to remain in their former condition and to further develop forest growth thereon."

Let us now consider, in their order, the several acts done by the Norfolk-Hampton Roads Company with reference to this land which the Court of Claims held constituted actual adverse possession:

> (a) "It recorded plats of its said property in which the land of said Reserve was included and indicated as a part of the company's holdings.
>
> (b) "The company's advertising matter issued in 1899, indicated as belonging to the

> ...npany lands which included the lands of said Reserve, and said land was included in the company's subdivision known as 'Subdivision No. 1, Norfolk on the Roads,' a plat of which, stating said subdivision to be the 'Property of Norfolk-Hampton Roads Company,' was recorded in the County Clerk's office on June 14, 1901."

Surely the recording of plats and publishing advertising matter cannot be considered as any evidence whatsoever of adverse possession. The rights of no one were affected by these actions of the Norfolk-Hampton Roads Company, and no one could prevent this. The most that can be said about these actions is that they indicated the Company was making a claim to the land.

In *Craig-Giles Iron Co.* v. *Wickline* (*Supra*), it was held that while evidence that land was assessed in the name of certain parties and the taxes on it paid by them and that they had forbidden trespassing thereon might show that they were making a *claim* to the land, it was wholly insufficient to "establish title thereto by adverse possession."

> (c) "In the development of its said property, streets were opened and graded through the land of said reserve;
>
> (d) timber was cut therefrom and used or marketed by the company;
>
> (e) and bulkheads were built by the company in front of the property to protect it from erosion by the waves and tides."

In the first place, the Court does not indicate to what extent "streets were opened and graded" and when this took place. The question of date is a very important one. Because, unless this were accomplished prior to June 28, 1902, and continued uninterruptedly for fifteen years thereafter, it would be no evidence at all of adverse possession.

The same may be said as to the cutting of timber. The Court does not find the extent of timber cutting, whether occasional or habitual, when it began and during what time it took place. This is important on the question of adverse possession.

In the case of *Taylor* v. *Burnsides*, 1 Gratt. (42 Va.) 165, 206, 207, it was said:

> "Payment of taxes, prohibition of trespasses, surveys of land, sales and conveyances of it, though they may serve to show a claim of title, are not evidence of actual possession. Even the cutting and selling of timber by the tenant himself, or by his authority, is but a transient trespass, unless habitual."

In *Chilton* v. *White*, 72 W. Va. 545, 78 S. E. 1048, it is said:

> "Occasional cutting of timber on, and ranging cattle over, wild and unclosed land is not such occupation of it as will amount to adverse possession."

In *Craig-Giles Iron Co.* v. *Wickline*, 126 Va. 223, it was held that the mere cutting and selling of timber at widely separated intervals did not constitute actual

possession, but that to sustain the defense of adverse possession, the defendants must have entered upon the land in controversy and taken possession thereof "by residence, improvement, cultivation, or other open, notorious and habitual acts of ownership." Judge Kelly, in delivering the opinion of the Court, uses the following language, which we have already quoted:

> "The additional acts of paying taxes, asserting title and forbidding trespasses do not aid a situation like this. The primary fact of actual possession must first be established. When this is done, proof of such additional acts is admissible, not as showing the possession itself, but as showing its good faith, exclusiveness, notoriousness and hostility."

The same considerations also apply to the act of the company in building bulkheads in front of the property to protect it from erosion.

In *Pasley* v. *English*, 5 Gratt. (46 Va.) 141, it was held that a temporary possession of land by cutting and sawing timber upon it was not such adversary possession as would give title.

In Hutcheson on Land Titles in Virginia and West Virginia, Section 365, we find this statement:

> "*Occasional acts of trespass.*—Fugitive cutting trees; stripping bark; surveys; cutting grass; tapping sugar trees in a forest from year to year, uninclosed; piling wood upon a vacant lot; digging and selling sand from time to time; annually entering upon land to cut timber, feed cattle, hunt or fish, with cultivation of truck

> patch in summer, as incidental to other pursuits; ranging cattle, or other like acts, amounting to mere trespasses, are not sufficient to establish actual possession."

All of the foregoing acts show that the Company was making some kind of a claim to the land and was exercising some acts of ownership over it but they are wholly insufficient to establish the fact of actual possession. We respectfully submit that the Court of Claims confused acts of ownership exercised over the property with actual possession of the property itself.

> (f) "Said company also leased an area of its lands to the Jamestown Exposition Company in 1907, including therewith said Prize lot Reserve land as belonging to plaintiff company,
>
> (g) and thereafter, upon the termination of the Exposition Company's lease, said lands were leased by plaintiff company to another tenant, by whom they were occupied for some time."

We may assume that actual adverse possession began in 1907 when the Norfolk-Hampton Roads Company leased this and other property to the Jamestown Exposition Company, who actually occupied it, and that by a subsequent lease to another tenant, who occupied it for some time, such adverse possession continued until June 28, 1917, when the land was taken by the United States. But this covers a period of only ten years, whereas, the Virginia statute requires actual, uninterrupted, adverse possession for a con-

tinuous period of fifteen years. In other words, assuming that this was actual adverse possession, it had not continued long enough to give the Norfolk-Hampton Roads Company *title to the land*, and, therefore, in 1917, when it was taken by the Government, the Vue de L'Eau Company was still the owner of the land.

We think it is perfectly clear from the Findings of Fact that there was no actual adverse possession of this land prior to the year 1907.

> (h) "And in general, the land of said Reserve was held out and treated by plaintiff company as being the property of said company. It does not satisfactorily appear who, if anyone, paid the taxes on said land between the year 1874 and 1917."

This certainly is no evidence of actual adverse possession.

It is well settled that this is not the criterion of possession. If it were so, it would lie in the power of any man to fix the legal standard to suit himself. Where a man is the lawful owner of property, it is not necessary for him to be in *actual* possession of it. His title papers speak for themselves and give him *constructive* possession. He may be in actual possession or not, as he likes. But when he attempts to acquire title to another man's property by adverse possession, the law requires him to take *actual* possession, evidenced by visible and notorious acts.

This question is set at rest in Virginia by the decision in *Taylor* v. *Burnsides*, 1 Gratt. (42 Va.) 165, 195.

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Judge Baldwin, in delivering the opinion of the Court, said:

> "That acts of ownership on the property indicate an adverse claim, is not, as I humbly conceive, sufficient, unless they amount to an adverse possession, that is to the occupancy, use of enjoyment of the premises. *Nor is it sufficient that they show a continued claim of the party, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.*"

And in that case it was decided that instructions predicated on the theory that the possession which an owner exercised over his own land was sufficient—were incorrect and should have been refused. (See pages 204, 205 and 206 of that volume).

In the light of these convincing Virginia authorities, we submit that the acts relied upon by the Court of Claims as constituting actual adverse possession of this land are clearly insufficient for that purpose. In other words, the conclusions of law of the Court of Claims are not justified by its Findings of Fact.

In Rule I of this Court, relating to appeal from the Court of Claims, it is provided in paragraph 2, that the record from the Court of Claims shall contain:

> "A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or

decree. The finding of facts and conclusions of law to be certified to this court as part of the record."

Under this rule, the Findings of Fact are in the nature of *a special verdict* and *they should be sufficient in and of themselves to justify the conclusion of law.*

It is submitted that these Findings by the Court of Claims are utterly insufficient to establish adverse possession for the statutory period of fifteen years, under the Virginia law. The only acts done by the Company on the land itself, as found by the Court, were opening and grading some streets through a portion of this land, cutting some timber therefrom, and building a bulkhead in front of the property. The extent of these acts, the times when they were committed, and the duration thereof, do not appear in the Findings. And, under the Virginia law, as we have already shown, these are most important when we are considering the question of whether or not they amounted to actual, uninterrupted, and continuous possession.

Claim of Right or Title Necessary:

But there is another reason why the claim of the Norfolk-Hampton Roads Company must be denied. We have already seen that one of the elements of adverse possession in Virginia, is a claim of right or title. We submit that the Norfolk-Hampton Roads Company had no claim of right or title to this land but was a wrong-doer from the outset.

In Finding VII (R. 13-14), the Court of Claims said, that after the Norfolk-Hampton Roads Company purchased the adjoining land it "* * * * without any right, title or interest, or claim of right, title or interest, in or to the lots or land of said Prize Lot Reserve, and with full knowledge of the fact that it had no claim of right, title or interest in or to any part of said lots or land, *deliberately set about trying to acquire title to said lots and land by adverse possession.*"

So here we have a case of a company attempting to take possession of "*property of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently.*" Every element of common law larceny is present save only the asportation. It would be a reproach to our civilization if title could be acquired in this manner.

In *Kincheloe* v. *Tracewells*, 11 Gratt. (52 Va.) 587, 605, Judge Lee, in delivering the unanimous opinion of the Court, said:

> "An entry by one upon land in possession, actual or constructive, of another, in order to operate as an ouster and gain a possession to the party entering, must be accompanied by a claim of title; but it is not indispensable that the claim should be ostensible in the form of a deed or any other writing. The claim, from its nature and character, may be wholly independent of any written evidence."

In *Creekmur* v. *Creekmur*, 75 Va. 430, 435, which was an action of ejectment, it was held that one of the essential elements of adverse possession was a bona-fide claim of title.

In delivering the opinion of the Court, Judge Staples says:

> "It is not necessary in the present instance to attempt any general definition of what is meant by 'adversary possession.' It is sufficient to say that, according to the best authorities, a possession to be adverse must be actual, exclusive, open and notorious. It must be accompanied with a bona-fide claim of title against the title of all other persons, and it must be continued for the period prescribed by the statutory bar. A mere naked possession without a claim of right, no matter how long continued, never ripens into a good title, but is regarded as being held for the benefit of the true owner. In all cases, a bona-fide claim of title is essential. When, however, the actual occupation of land, accompanied with such claim, continues for the period prescribed by the statute, the effect is to confer title upon the occupant without reference to the original merits of the controversy, and even against the plainest and most convincing proof of a better original title."

In *Virginia Midland Railroad Co.* v. *Barbour* (1899), 97 Va. 118, 122, the two foregoing cases were cited with approval, and it was held that a hostile "claim of title" was an essential element of adverse possession.

In *Yellow Poplar Lumber Co.* v. *Thompson* (1908), 108 Va. 612, the Creekmur case was followed, and it was held that "a bona-fide claim of title" was an essential element of adverse possession.

In *Parkersburg Co.* v. *Schultz* (W. Va.) 27 S. E. 255, it was held:

> "Mere naked possession of land, without claim of right, is no adverse possession, and no matter how long continued, will not furnish a defense to an action, or confer title."

In *Jasperson* v. *Scharnikow*, 150 Fed. 571, the United States Circuit Court of Appeals for the Ninth Circuit considered this question, and quoted with approval the following language used by the trial court:

> "This idea of acquiring title by larceny does not go in this country. A man must have a bona-fide claim, or believe in his own mind that he has got a right as owner, when he goes upon land that does not belong to him, in order to acquire title by occupation and possession. The defendant's evidence fails to show any claim of right in Bryant when he went on the land. There is not a particle of testimony that squints in the direction that he supposed that he had any right, or that he went there for any other purpose than to acquire right, if he could do so by holding long enough without molestation."

It is true that this decision was based upon a statute of the State of Washington, which provided that the party must be in possession under a claim and color of title "made in good faith." But in view

of the Virginia doctrine announced in *Creekmur* v. *Creekmur*, 75 Va. 430, 435, and other cases, to the effect that "a bona-fide claim of title is essential" we think the Jasperson case is pertinent.

CONCLUSION.

Here is a case where the Vue de L'Eau Company had the record title to the land in controversy, and by virtue of its title papers was in constructive possession thereof under the Virginia law. The Norfolk-Hampton Roads Company, knowing that it had no right, title or interest in this land, deliberately sought to acquire it by adverse possession. The acts which it did in this attempt to take the land of another are set forth in the Findings of Fact of the Court of Claims. Under the Virginia law, the burden of proof is upon the Norfolk-Hampton Roads Company to show by clear and convincing evidence that it had actual, uninterrupted, adverse possession of this land for a period of fifteen years.

We respectfully submit, that the Norfolk-Hampton Roads Company has failed to sustain this burden, that the conclusions of law of the Court of Claims are not justified by its own Findings of Fact, and such being the case, the record title of the true owner, the Vue de L'Eau Company, must prevail.

If our views as to this are correct, then it follows that the Vue de L'Eau Company was the owner of the land in controversy on June 28, 1917, when it was

taken by the United States, and that its Receiver is entitled to recover of the United States its vaule, viz., $33,000.00.

We ask that the judgment of the Court of Claims rendered on the 28th day of June, 1922, be reversed and that this Court render a judgment in favor of Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, against the United States, for the sum of $33,000.00.

Respectfully submitted,

E. R. F. WELLS,
Attorney for Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company.

FILED
MAY 8 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 552. 109

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE' L'EAU COMPANY, a corporation,

Intervenor, Appellant,

v.

THE UNITED STATES.

Motion of Norfolk Hampton Roads Company for leave to be heard as a party appellee; and motion of same that appellant be required to give security for damages and costs, with brief in support of said motions.

H. H. RUMBLE,
Attorney for Norfolk-Hampton Roads Company.
Norfolk, Virginia.

RUMBLE & RUMBLE,
Of Counsel for Norfolk-Hampton Roads Company.
Norfolk, Virginia.

IN THE

Supreme Court of the United States

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No. 552.

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE' L'EAU COMPANY, a corporation,

Intervenor, Appellant,

v.

THE UNITED STATES.

To E. R. F. Wells, Esq., and W. Leigh Williams, Esq., Attorneys for the Appellant,

To the Honorable, the Attorney-General of the United States:

You will please take notice that on Monday, the 21st day of May, 1923, at the coming in of the Court, or as soon thereafter as counsel can be heard, the fol-

lowing motions will be submitted to the Supreme Court of the United States:

(a) A motion that Norfolk-Hampton Roads Company be admitted as a party appellee to the above-entitled cause, and entered as such upon the docket and records of said Court, with leave to defend therein and file a brief and participate in the argument of said cause in all respects as if said company had originally been named as one of the appellees in said cause; and

(b) A motion that appellant be required, within such time as the said Court may prescribe, to give bond with good security in a penalty to be fixed by said Court, conditioned that the appellant shall prosecute its appeal to effect, and if it shall fail to make its plea good, that it shall answer all damages and costs; or failing to give such bond as required, that said appeal be dismissed; the order requiring such bond so to provide.

A copy of the said motion and of the brief in support thereof is hereunto attached, and delivered to you and each of you at the time of the service of this notice.

Very respectfully,

H. H. RUMBLE,

Attorney for Norfolk-Hampton Roads Company.

Due and legal service of the foregoing and annexed notice with copies of motions and brief attached, accepted and acknowledged this 23d day of April, 1923.

WILLIAM LEIGH WILLIAMS,
E. R. F. WELLS,
Attorneys for Appellant.

Due and legal service of the foregoing and annexed notice with copies of motions and brief attached, accepted and acknowl- this 26th day of April, 1923.

The United States have no objection to the granting of the said motions.

JAMES M. BECK,
Solicitor General, for the United States.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 552.

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE' L'EAU COMPANY, a corporation,

Intervenor, Appellant,

v.

THE UNITED STATES.

Comes now Norfolk-Hampton Roads Company, and moves this Honorable Court as follows:

(a) That said Norfolk-Hampton Roads Company be admitted a party appellee to the above-entitled cause, and entered as such upon the docket and records of said Court, with leave to defend therein and file a brief and participate in the argument of said cause in all respects as if said company had originally been named as one of the appellees in said cause; and

(b) That appellant be required, within such time as the said Court may prescribe, to give bond with good security in a penalty to be fixed by said Court, conditioned that the appellant shall prosecute its appeal to effect, and if it fail to make its plea good, that it shall answer all damages and costs; or failing to give such bond as required, that said appeal be dismissed; the order requiring such bond so to provide.

BRIEF IN SUPPORT OF MOTIONS.

This case presents a situation entirely unusual in appeals from the United States Court of Claims. Ordinarily a controversy before that Court is between a single plaintiff or group of plaintiffs on the one hand, and the United States on the other. Here Norfolk-Hampton Roads Company, the mover, was the original plaintiff in the court below. Guaranty Title & Trust Corporation, as Receiver, intervened in that suit, claiming that it, and not the plaintiff, was entitled to recover from the United States, the value of a part of the lands taken from the plaintiff. The Court entered judgment in favor of the plaintiff, Norfolk-Hampton Roads Company, and dismissed the petition of the intervenor. From this judgment the intervenor appealed. The United States did not appeal.

Norfolk-Hampton Roads Company, though not cited to appear herein and not named in the record as a party to this appeal, is, nevertheless, interested in the result, and a necessary party.

The above facts are more fully and particularly set forth in the following statement.

STATEMENT.

This is an appeal from the judgment of the United States Court of Claims entered on the 26th day of June, 1922, in the suit of Norfolk-Hampton Roads Company, Plaintiff, and Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, Intervenor, *v.* The United States.

The suit was brought by Norfolk-Hampton Roads Company to recover the value of certain land known as the "Pine Grove Block," which was taken from the plaintiff company for the United States by proclamation of the President, June 28th, 1917, pursuant to an act of Congress authorizing the establishment of a Naval Operating Base, Hampton Roads, Virginia. (Act June 15th, 1917, Public, number twenty-three, Sixty-Fifth Congress).

In its petition the plaintiff, Norfolk-Hampton Roads Company, alleged that at the time of the taking it owned and occupied the entire block; that title and possession thereof were taken from the plaintiff by the United States; and that no part of the value had been paid; and prayed judgment for such value.

This suit was brought on December 7th, 1920. On April 12th, 1921, the Circuit Court of the City of Norfolk, Virginia, appointed Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, and authorized it to assert a claim against the United States for the value of a part of the said land.

Thereafter, on May 31st, 1921, Guaranty Title and Trust Corporation, as such receiver, filed its petition of intervention in the aforesaid suit of Norfolk-Hampton Roads Company *v.* The United States, claiming that at the time of the taking of said land Vue de

L'Eau Company had title to a portion thereof, and asserting a claim against the United States for the value of such portion. Evidence was afterwards taken on behalf of the Intervenor, and on May 22d, 1922, the case was argued before the Court of Claims and submitted, counsel for both Plaintiff and Intervenor conceding that that Court had jurisdiction to hear and determine the whole controversy.

On June 26th, 1922, the United States Court of Claims filed its findings of fact, wherein among other things, the said Court found the value of that portion of said land which was not in dispute to be the sum of $35,500.00; and the value of that portion thereof claimed by both plaintiff, Norfolk-Hampton Roads Company, and the said Intervenor, the sum of $33,000. As a conclusion of law on said findings of fact said Court held that the plaintiff, Norfolk-Hampton Roads Company, is entitled to recover the sum of $68,500, the value of the whole of said tract as found therein, both the portion in dispute and the portion not in dispute; and that the intervenor, Guaranty Title and Trust Corporation, Receiver, is not entitled to recover.

Thereupon, in conformity with said conclusion of law, the said Court entered judgment in favor of the plaintiff, Norfolk-Hampton Roads Company, against the United States for the said sum of $68,500, and by the same order, dismissed the petition of the Intervenor with judgment in favor of the United States for such part of the cost of printing the record in said cause as is properly chargeable to the Intervenor, the amount to be entered by the Clerk, said costs as determined by the Clerk amounting to $105.39.

From the aforesaid judgment in favor of the plain-

tiff, Norfolk-Hampton Roads Company, the United States took no appeal.

On August 1st, 1922, the Intervenor, Guaranty Title and Trust Corporation, applied for and obtained an appeal from the said judgment.

No citation was served on Norfolk-Hampton Roads Company. The Clerk below does not seem to have regarded that company as a party to the appeal. Its name nowhere appears on the record as appellee. This was doubtless due to the unusual character of the appeal.

After the appeal was taken, viz., in November, 1922, the United States, with the consent of the Intervenor, expressed by formal stipulation, paid to Norfolk-Hampton Roads Company, on account of said judgment, the sum of $35,500, representing the value of that portion of said lands which was not in dispute. The Government has not paid, and pending said appeal, of course will not pay to the plaintiff the balance of said judgment. That balance, the sum of $33,000, is the amount in controversy on this appeal.

ARGUMENT.

Motion (a). On the facts disclosed by the printed record as amplified and explained in the foregoing statement, it is clear that Norfolk-Hampton Roads Company is a necessary party on this appeal. It is entitled to defend the judgment in its favor. It is, if anything, more interested in the result than the United States, the nominal appellee. The cause cannot proceed in its absence. No argument is needed, therefore, to show the propriety of granting its motion,

that it be entered upon the record as a party appellee with leave to defend the judgment in its favor in all respects as if it had been originally named a party appellee.

Motion (b). It would seem equally clear that appellant should be required to give bond to cover interest and costs. In the ordinary appeal from the Court of Claims, only the plaintiff and the United States are interested. No bond is needed in such case and none is required.

Here, however, we have the unusual situation of an appeal by an intervenor from a judgment in favor of the plaintiff; the defendant, the United States, being satisfied with the judgment and taking no appeal.

The effect of the appeal was to prevent the full payment of the judgment in favor of the plaintiff, Norfolk-Hampton Roads Company. But for the appeal, the Government would have paid the whole judgment, $68,500, when it paid the $35,500 on account thereof. Payment of the balance of the judgment, $33,000, has been effectually stopped by the appeal. The latter operated as a supersedeas.

The judgment bears no interest as against the United States. If affirmed on appeal, the principal only will be paid by the United States, however long the time that may elapse before the case is disposed of.

In that situation it is but just that the intervenor, if unsuccessful in its appeal, pay the plaintiff interest on the sum of $33,000 for the time payment was prevented by the appeal. As against the United States, the intervenor has the right to appeal without giving bond, but not as against a private party whose judgment is *ipso facto* suspended by the appeal.

It is to be observed in this connection that the intervenor, Guaranty Title and Trust Corporation, is

suing in a representative capacity only. It sued as receiver. It would not be personally liable on a judgment for interest and costs; and it has no fund out of which such judgment could be satisfied.

It is therefore just and proper that the intervenor be required to give bond with good security to cover interest and costs; and that its appeal be dismissed, if having been required to give such bond, it shall fail to comply with the order of the Court. Such requirement would seem to be at least within the spirit of R. S. Sec. 1000, Compiled Stat., Sec. 1660.

Nor can we doubt that independently of statute, this Honorable Court, in the exercise of its inherent power to do justice between the parties before it, has the authority so to require and direct.

Where an appeal bond is not given as required by statute, this Court will on motion require it to be given within a prescribed time, and in default thereof will dismiss the appeal.

Catlett v. *Brodie*, 9 Wheat, 553.
Anson, Bangs & Co. v. *The Blue Ridge R. R. Co.*, 23 How. 1.
Peugh & Davis, 110 U. S. 227.
Dodge v. *Knowles*, 114 U. S., 436.

It is respectfully submitted that both of said motions should be granted.

Very respectfully,

H. H. RUMBLE,
Attorney for Norfolk-Hampton Roads Company.

H. H. RUMBLE, Norfolk, Va.,
Attorney for Norfolk-Hampton Roads Company.

RUMBLE & RUMBLE, Norfolk, Va.,
Of Counsel.

FILED
MAY 18 1923
WM. R. STANSBU
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. [redacted] 109

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE L'EAU COMPANY, a corporation,

Intervenor, Appellant,

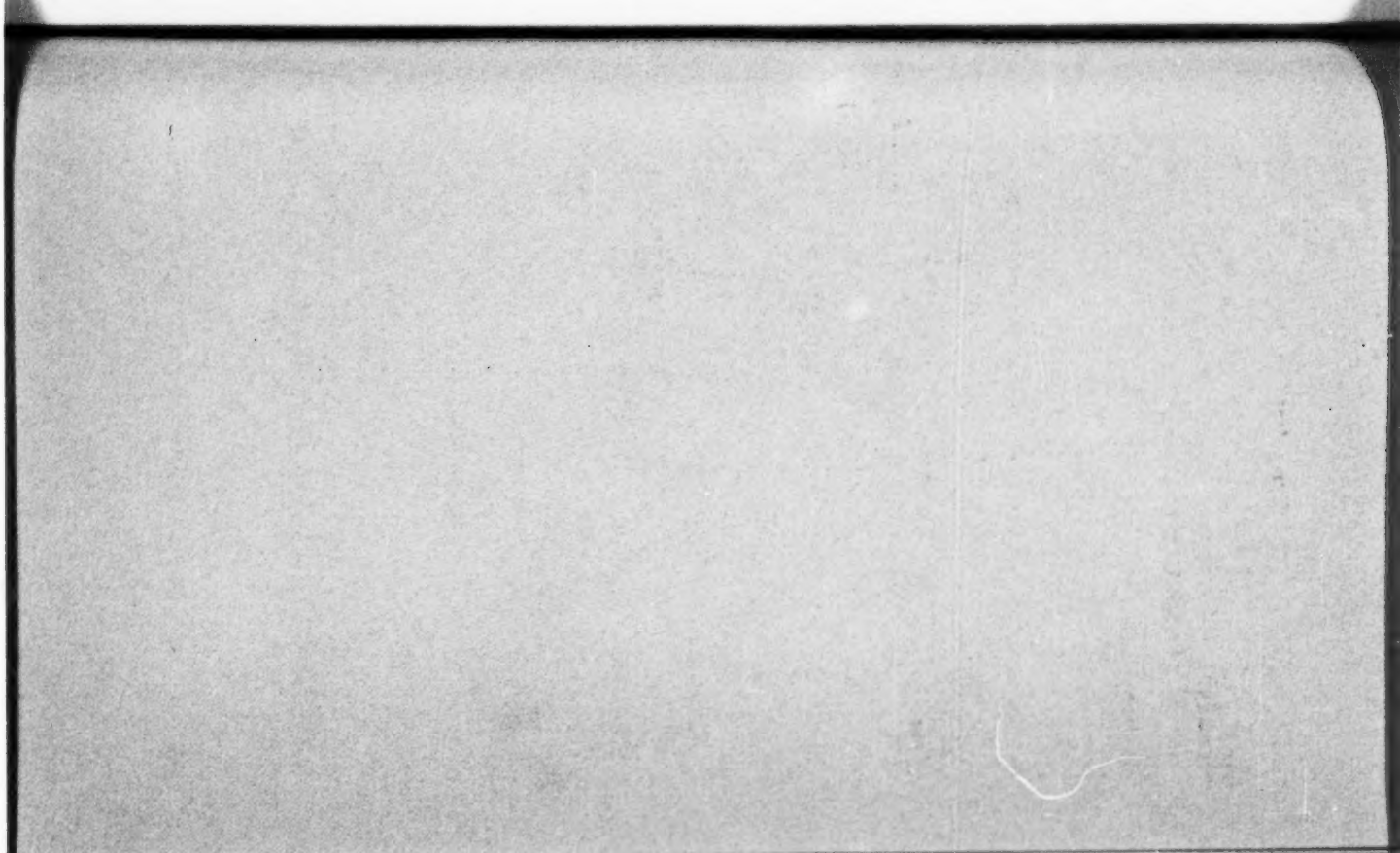
v.

THE UNITED STATES.

REPLY TO APPELLANT'S "BRIEF IN OPPOSITION TO MOTION B, MADE BY NORFOLK-HAMPTON ROADS COMPANY."

H. H. RUMBLE,
Attorney for Norfolk-Hampton Roads Company.

RUMBLE & RUMBLE,
Of Counsel, Norfolk, Va.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 552.

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE L'EAU COMPANY, a corporation,

Intervenor, Appellant,

v.

THE UNITED STATES.

REPLY TO APPELLANT'S "BRIEF IN OPPOSITION TO MOTION B, MADE BY NORFOLK-HAMPTON ROADS COMPANY."

Counsel for the appellant contend that the appeal in this case did not operate as a *supersedeas* to the judgment appealed from; and on this ground chiefly, base their opposition to motion (b) of Norfolk-Hampton

Roads Company that the appellant be required to give security for damages and costs.

The attention of the Court is respectfully invited to the fact that the appellant voluntarily intervened in the suit then pending in the Court below between Norfolk-Hampton Roads Company and the United States. By that act it admitted that the Court of Claims had jurisdiction to determine the whole controversy.

That Court had in a number of cases arising under the Abandoned and Captured Property Acts, sustained its jurisdiction to decide the question of title as between conflicting claimants, in some cases entertaining intervening petitions, and in others requiring separate suits for the proceeds of the same property to be consolidated and heard together.

Turner v. *The United States*, 2 Ct. of Cl. 390.

Woodruff v. *The United States*, 4 Ct. of Cl. 486.

Hill v. *The United States*, 8 Ct. of Cl. 361.

Counsel for the appellant, then the intervenor, united with counsel for Norfolk-Hampton Roads Company, then the plaintiff, in a memorandum which was submitted to the Court of Claims, urging that that Court had jurisdiction to determine the whole controversy, and citing the above cases as authority.

The case was submitted to the Court of Claims on that theory, and on that theory decided. The judgment entered by the Court of Claims on June 26, 1922, disposed of the whole controversy. Counsel

say, appellant did not ask for a *supersedeas* to that judgment. True, but it did what amounted to the same thing so far as stopping payment is concerned. It appealed from that judgment. It is to be observed that the appeal was not from so much of the judgment as dismissed the intervenor's petition; but from the *whole* judgment. (Record, p. 16.) That necessarily brought up the whole controversy to this Court.

If, as contended, the appeal now pending concerns only the appellant and the United States, it is difficult to see why appellant does not oppose motion (a), that Norfolk-Hampton Roads Company be admitted as a party appellee. If that contention were sound, the latter company would have no right to intervene.

It is submitted that appellant having elected to intervene in the suit of Norfolk-Hampton Roads Company v. The United States, instead of bringing a separate suit; and having submitted its claim for the determination of the Court in that suit, litigating therein its rights as against those of Norfolk-Hampton Roads Company, and having appealed from the judgment of that Court disposing of the whole controversy, should not now be heard to say that the appeal concerns only itself and the United States.

Counsel further suggest that no security is necessary because appellant when appointed receiver of Vue de L'Eau Company gave bond as such. It need hardly be pointed out that the bond of a receiver is conditioned for the faithful discharge of his duties as receiver; and that while it would cover his

failure to account for moneys received, it would not cover his liability to third parties where no assets have come into his hands.

It is very respectfully submitted that both motion (a) and motion (b) should be granted.

H. H. RUMBLE,

Attorney for Norfolk-Hampton Roads Company.

RUMBLE & RUMBLE,

Of Counsel, Norfolk, Va.

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WM. R. STANSBURY

Supreme Court of the United States

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No. 109

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE L'EAU COMPANY, a corporation,

Intervenor, Appellant.

v.

THE UNITED STATES.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION (b) MADE BY NORFOLK-HAMPTON ROADS COMPANY.

WM. LEIGH WILLIAMS,

E. R. F. WELLS,

Attorneys for Appellant.

Supreme Court of the United States

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BRIEF OF APPELLANT IN OPPOSITION TO MOTION (b) MADE BY NORFOLK-HAMPTON ROADS COMPANY.

The Norfolk-Hampton Roads Company has submitted two motions in writing as follows:

"(a) A motion that Norfolk-Hampton Roads Company be admitted as a party appellee to the above entitled cause, and entered as such upon the docket and records of said Court, with leave to defend therein and file a brief and participate in the argument of said cause in all respects as if said Company had originally been named as one of the appellees in said cause; and

(b) A motion that appellant be required, within such time as the said Court may prescribe, to give bond with good security in a penalty to be fixed by said Court, conditioned that the appellant shall prosecute its appeal to effect, and if it shall fail to make its plea good, that it shall answer all damages and costs; or failing to give such bond as required, that said appeal be dismissed; the order requiring such bond so to provide."

The appellant makes no objection to motion (a); the appeal was applied for and allowed in accordance with the rules and practice of the United States Court of Claims, and it was assumed that all of the parties in that Court thereby became parties to the appeal.

The appellant emphatically resists motion (b), which is to require it to give bond with security to prosecute its appeal to effect, and if it shall fail to make good its plea, to pay the Norfolk-Hampton Roads Company all damages and costs. In other words, the Norfolk-Hampton Roads Company asks this Court to require the appellant to give a supersedeas bond.

ARGUMENT.

(1) In the first place the allowance of an appeal by the United States Court of Claims does not have the effect of a supersedeas. If it be true, as stated on page 9 of the brief of counsel for Norfolk-Hampton Roads Company, that the United States has not paid to it the entire amount of the judgment rendered in its favor by the Court of Claims, it is not because a

supersedeas or other similar writ was granted at the instance of the appellant, but it is because the United States of its own volition refuses to pay it, and the Norfolk-Hampton Roads Company cannot enforce payment.

The appellant has never prayed for a supersedeas or any similar writ prohibiting the United States Government from paying the amount of the judgment rendered in favor of Norfolk-Hampton Roads Company. So far as we are advised there is no such writ available to the appellant. If the United States desires to pay forthwith the entire amount of the judgment rendered by the Court of Claims in favor of Norfolk-Hampton Roads Company, it has a perfect right to do so, but if the judgment of the Court of Claims be reversed, it may have to pay a portion thereof a second time to the appellant. The appellant is content to rely on the financial responsibility of the United States without the aid of a supersedeas. It is therefore not correct to say that the appeal "operated as a supersedeas."

Even in controversies between private parties where the one appealing has the right to a supersedeas pending the appeal, he does not have to exercise this right if he is willing to rely on the financial responsibility of the other party. It is a matter of common practice for appeals to be taken without a supersedeas being asked for. The most that can be said is that the appellant takes some risk, but as to this no one else may complain.

(2) In the second place there is no statute or rule of either Court with which we are familiar, which requires a party appealing from a judgment of the

Court of Claims to give a bond. On page 10 of the brief of counsel for Norfolk-Hampton Roads Company the following statement is made: "As against the United States, the intervenor has the right to appeal without giving bond, but not as against a private party whose judgment is *ipso facto* suspended by the appeal." No authority is cited in support of this statement and we have been able to find none. We must also take issue with counsel in his statement that the judgment is "*ipso facto* suspended by the appeal." The judgment is not suspended at all by the appeal, but the United States simply refuses to pay.

Certainly in the absence of a statute, this Court cannot arbitrarily require the appellant to execute a supersedeas bond for the benefit of the Norfolk-Hampton Roads Company. When this appeal was taken the provisions of the applicable statutes and rules of Court were complied with, and it would seem clear that this Honorable Court has not the power to make additional requirements.

On page 11 of his brief, counsel for Norfolk-Hampton Roads Company says that such a requirement would seem to be at least within the spirit of R. S. Sec. 1000, Comp. Stat. Sec. 1660. This Section requires a justice or a judge signing a citation on any writ of error, with certain exceptions, to take good and sufficient security for damages and costs "where a writ is a supersedeas and stays execution." This clearly has no application to the case at bar.

It must be borne in mind that the claim of the appellant is against the United States and not against Norfolk-Hampton Roads Company. The Court of

Claims dismissed its claim against the United States and it is from that judgment that this appeal is being prosecuted. If, during the pendency of the appeal, the United States sees fit to pay the Norfolk-Hampton Roads Company the amount of the claim there is no process which prevents its doing so, but it runs the risk of having to pay it the second time if the judgment of this Court be in favor of the appellant.

Nor is any bond required of the appellant for Court costs. In accordance with the rules and practice of this Court, deposits for costs have been required and made in advance.

The record shows that the appellant executed a bond in the State Court conditioned for the faithful discharge of its duties as receiver (R. 9, 10).

It is respectfully submitted that motion (b) should be dismissed.

WM. LEIGH WILLIAMS,

E. R. F. WELLS,

Attorneys for Appellant.

FILED
OCT 10 1923
WM. R. STANSBURY

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October Term 1923.

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v.

THE UNITED STATES.

BRIEF ON BEHALF OF NORFOLK-HAMPTON ROADS COMPANY, APPELLEE.

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THE UNITED STATES.

BRIEF ON BEHALF OF NORFOLK-HAMPTON ROADS COMPANY, APPELLEE.

STATEMENT.

History of the Litigation.

This is an appeal from the judgment of the United States Court of Claims entered on the 26th day of June, 1922, in the suit of Norfolk-Hampton Roads

Company, Plaintiff, and Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, Intervenor, *v.* The United States.

The suit was brought by Norfolk-Hampton Roads Company to recover the value of certain land known as the "Pine Grove Block," which was taken from the plaintiff company for the United States by proclamation of the President, June 28, 1917, pursuant to an Act of Congress authorizing the establishment of a Naval Operating Base, Hampton Roads, Virginia. (Act June 15, 1917, 40 Stat. 207.)

In its petition the plaintiff, Norfolk-Hampton Roads Company, alleged that at the time of the taking it owned and occupied the entire block; that title and possession thereof were taken from the plaintiff by the United States; and that no part of the value had been paid; and prayed judgment for such value.

The suit was instituted on December 7, 1920.

On April 12, 1921, the Circuit Court of the City of Norfolk, Virginia, on the *ex parte* application of one Grice, who claimed to be a stockholder, appointed Guaranty Title and Trust Corporation receiver of Vue de L'Eau Company, and authorized it to assert a claim against the United States for the value of a part of said land.

Thereafter, on May 31, 1921, Guaranty Title and Trust Corporation, as such receiver, filed its petition of intervention in the above-mentioned suit of Norfolk-Hampton Roads Company *v.* The United States, claiming that at the time of the taking of said land Vue de L'Eau Company had title to a portion thereof and asserting a claim against the United States for the value of such portion.

Evidence was taken, and on May 22, 1922, the case was argued before the Court of Claims and submitted.

On June 26, 1922, the United States Court of Claims filed its findings of fact, wherein among other things, the said Court found the value of that portion of said land, which was not in dispute, to be the sum of $35,500.00; and the value of that portion thereof claimed by both plaintiff, Norfolk-Hampton Roads Company, and the said Intervenor, the sum of $33,000.00. As a conclusion of law on its findings of fact said Court held that the plaintiff, Norfolk-Hampton Roads Company, was entitled to recover the sum of $68,500.00, the value of the whole of said tract as found therein, both the portion in dispute and the portion not in dispute; and that the Intervenor, Guaranty Title and Trust Corporation, Receiver, was not entitled to recover. (Record, p. 15.)

Thereupon, in conformity with said conclusion of law, the said Court entered judgment in favor of the plaintiff, Norfolk-Hampton Roads Company, against the United States for the said sum of $68,500.00, and by the same order, dismissed the petition of the Intervenor. (Record, p. 15.)

From this judgment the Intervenor, Guaranty Title and Trust Corporation, appealed. The United States did not appeal. Norfolk-Hampton Roads Company, the plaintiff below, was originally not made a party to this appeal; but on its motion, was admitted as a party appellee by this Court by order of June 4, 1923.

After the appeal was taken, viz., in November, 1922, the United States, with the consent of the Inter-

venor-Appellant, expressed by formal stipulation, paid to Norfolk-Hampton Roads Company on account of said judgment, the sum of $35,500.00, representing the value of that portion of said land which was not in dispute.

The balance of the judgment, $33,000.00, is the amount in controversy on this appeal.

For convenience, the Norfolk-Hampton Roads Company, plaintiff below, will be referred to herein as Plaintiff-Appellee. References to the Findings of Fact will be abbreviated to the word Finding, with the appropriate paragraph number, and page of the record added, thus: "Finding II, p. 11."

Facts of the Case.

The land in dispute in this case was taken by the Government from Norfolk-Hampton Roads Company.

It was a part of the parcel of land designated as Pine Grove, all of which was in possession of the Norfolk-Hampton Roads Company, on and prior to June 28, 1917.

Possession and control of the entire block or parcel were surrendered by that company to the United States on or before August 1, 1917, pursuant to proclamation and demand of the President under date of June 28, 1917. Finding II, pp. 11 and 12.

The Pine Grove Block containing 9.22 acres was a part of a tract of about 294 acres, which for several years immediately prior to 1874 had belonged to the Vue de L'Eau Company, a corporation chartered under the laws of Virginia. Finding III, p. 12.

About the year 1873 the Vue de L'Eau Company caused a small area of its land to be subdivided into lots and streets, designating the same as the "Prize Lot Reserve." Seven of these lots had been conveyed by the Vue de L'Eau Company prior to the assignment hereinafter mentioned. These seven lots are in no wise involved in this litigation. The portion of the "Prize Lot Reserve" that is involved herein contained 4.55 acres.

In January, 1874, the Vue de L'Eau Company executed a deed of assignment for the benefit of its creditors, whereby it conveyed to trustees under the assignment all of its lands and other property except the land embraced in the "Prize Lot Reserve." Finding IV, pp. 12 and 13.

Immediately after the general assignment for the benefit of its creditors, Vue de L'Eau Company became dormant. No organization in the way of a board of directors or officers was kept up, though no formal dissolution was had. Legally and technically it continued to exist, but in point of fact, it was in a condition of suspended animation, wholly dormant and inactive. Finding V, p. 13.

From the time of the assignment for the benefit of its creditors in 1874, until April, 1921, four years after this land was taken by the Government, Vue de L'Eau Company continued dormant. During that period of forty-seven years it did nothing whatever with reference to the land and lots comprising the "Prize Lot Reserve." It abandoned this land immediately after the general assignment for the benefit of its creditors in 1874, leaving it then in a condition of neglect. Finding VI, p. 13.

In the year 1899, Norfolk-Hampton Roads Company acquired by purchase a large acreage of land contiguous and adjacent to the so-cal'ed "Prize Lot Reserve," its holdings completely inclosing the latter on its land side. Finding III, p. 12 and Finding VII, p. 13.

The "Prize Lot Reserve" was at this time in a condition of neglect. It had been abandoned by the owner of the record title twenty-five years before. It lay there a small parcel of "No Man's Land," and so situated with reference to the property of Norfolk-Hampton Roads Company as to interfere with the development of the latter. In that situation it seemed desirable to acquire title to the said "Prize Lot Reserve" by adverse possession. Indeed, as is apparent from the Findings of Fact, that was the only way title could be acquired, the owner of the record title having then been dormant for a quarter of a century, and there being no one with whom negotiations for its purchase could be had.

Accordingly, Norfolk-Hampton Roads Company deliberately set about the acquisition of title to said land by adverse possession. For that purpose it took immediate possession of said land when it acquired the contiguous lands in 1899; and in the most open and notorious way, asserted claim to it by acts of record and otherwise.

The Findings of Fact bearing upon the character and duration of that possession will be dealt with at the appropriate place in the argument.

Here we content ourselves with the statement that from 1899 until title and possession were taken from

it by the Government in 1917, Norfolk-Hampton Roads Company was in the actual, open, notorious, uninterrupted and exclusive possession of the land of the "Prize Lot Reserve," claiming and treating it in all respects as its own; and that its possession was hostile to the owner of the record title.

ARGUMENT.

The appellant in this case complains of a judgment rendered in favor of Norfolk-Hampton Roads Company against the United States. The Government was satisfied with the judgment and took no appeal. As shown by the Findings of Fact all of the dealings of the Government with respect to this property were had with Norfolk-Hampton Roads Company. From that company the property was taken. It is a fair conclusion that the Government took no appeal because it had taken property of value from the Plaintiff-Appellee—its possession and use, if nothing more—and was willing that just compensation be paid therefor. For even if the contention of appellant that the actual possession of Norfolk-Hampton Roads Company did not begin until the year 1907 were true—and it is not true; yet in disturbing a possession of even that duration, in depriving Norfolk-Hampton Roads Company of the possession and use of the property and the improvements made in the course of its possession, the Government took from that company property of value for which it was entitled to compensation. A judgment in its favor therefore could not be wholly wrong, even if the naked legal title had been

in Vue de L'Eau Company at the time of the taking.

But the Court of Claims found that Norfolk-Hampton Roads Company had acquired title by adverse possession. In this finding and in the judgment based thereon, we submit, there was no error. In this connection we ask the indulgence of the Court in a somewhat extended review of the law relating to the acquisition of title by adverse possession.

THE LAW RELATING TO TITLE BY ADVERSE POSSESSION.

Statutory Period Fifteen Years.

It is provided by statute in Virginia, that

> "No person shall make an entry on or bring an action to recover, any land lying east of the Alleghany mountains, but within fifteen years, or any land lying west of the Alleghany mountains, but within ten years, next after the time at which the right to make such entry or bring such action shall have first accrued to himself or to some person through whom he claims."

Code of Virginia of 1887, Sec. 2915; Code of 1904, Sec. 2915, and Code of 1919, Sec. 5805.

Adverse possession of land for the period of the Statute of Limitations not only bars the owner's right of entry or action; but transfers the legal title to the occupant. The statute is a source of title as well as a defense.

Minor on Real Property, Sec. 1021, p. 1098.
Middleton v. *Johns*, 4 Gratt. 129.

Norfolk City v. *Cooke*, 27 Gratt. 430.
Thomas v. *Jones*, 28 Gratt. 383.
Dickenson v. *Colgrove*, 100 U. S. 578.
Virginia Midland Co. v. *Barbour*, 97 Va. 118.

Such possession must be actual, open and notorious, exclusive, continuous and uninterrupted, and hostile.

Taylor v. *Burnside*, 1 Gratt. 166.
Sulphur Mines Co. v. *Thompson*, 93 Va. 293.
Minor on Real Property, Vol. II, Sec. 1025, p. 1103.

Color of Title Not Necessary.

It is not necessary that such possession be under color of title. Color of title is important only where constructive possession is relied upon. Possession under a mere claim is sufficient. The difference is, that where one claims under a deed or other instrument constituting color of title, his possession of a *part* of the land within the boundaries therein described is extended to the whole. *Stull* v. *Rich Patch Iron Company*, 92 Va. 253. But if he is in possession under a claim only, then his title by adverse possession is limited to the land in his actual possession.

Sulphur Mines Co. v. *Thompson*, 93 Va. 293.

The latter case involved a controversy over the title to twenty-five acres of land, the defendant claiming the same by adverse possession. The deed whereby the defendant acquired title to the adjoining lands known as the Furnace property did not cover the twenty-five acre tract in controversy, nor was it covered by the deeds to those under whom the defendant claimed. (See p. 318 of the official report). It appeared that a prior owner of the Furnace property had had a map of that property made which did include the land in question. This map was shown to defendant when it purchased the Furnace property; but was not attached to the deed, nor was it ever recorded. The defendant, therefore, had no color of title to the twenty-five acre tract unless it was supplied by this unrecorded map. It was held that the map was not color of title; but that it was proper evidence to show the extent and character of the defendant's claim. Judge Buchanan, speaking for the Court, said:

> "The survey and map were proper evidence to show the character of defendant's claim of right or title. If it and those under whom it claims were continuously in adverse possession of the whole, or any part of the land in controversy for the statutory period prior to the institution of this action, then its title to the land to the extent that it and those under whom it claims had occupied, cultivated, enclosed or otherwise excluded the owner from it became perfect, but if such occupancy did not extend to the whole of the land in controversy its possession would be limited to the land so held and could not be extended to the residue

of the land in controversy, as would have been the case if the possession had been taken and held under color of title instead of claim of right or title only."

Nor is it Necessary That Such Claim be Valid.

The claim that will support adverse possession so as to confer title upon the occupant need not be founded upon any writing of any kind whatsoever, and it is wholly immaterial whether such claim was originally good or bad, valid or void.

> "As has often been asserted, it is not requisite that the claim under which a possession of land is commenced should be valid. It is sufficient if the party 'clearly, unequivocally and notoriously' claimed absolute title to the exclusion of all right, title or interest in the true owner. It is wholly immaterial whether the claim upon which an adverse possession is founded is made upon a valid or void instrument; nor indeed is it necessary, except in cases of constructive occupancy, that the claim should be founded upon any written instrument whatever. But the possession must be under a claim of the entire title, and the same must be in open hostility to the true title."

Tyler on Ejectment and Adverse Enjoyment, p. 887.

In *Virginia Midland R. Co.* v. *Barbour*, 97 Va. 118, the property in controversy was purchased in 1868 by one John T. Hicks. Hicks becoming bankrupt, the

property was sold by his assignee in bankruptcy in 1878, and regularly conveyed to the purchaser, Virginia Midland, etc., Railroad Company. Shortly thereafter one B. F. Nalle, as agent for the railroad company, made demand on Hicks for possession. Hicks, with shot gun in hand, ordered Nalle and two workmen he had with him off the place, telling them the railroad company had no title to it and that it belonged to him, and threatening to shoot Nalle unless he got off. Taking counsel of his prudence, Nalle withdrew, leaving Hicks in possession. Hicks continued to hold the property until his death in 1887, and thereafter his widow and son continued to occupy it down to the time the suit was brought in 1898. After the demand of Nalle in 1878 the railroad company made no further attempt to get possession of the property. Upon that state of facts it was insisted that the possession of Hicks and those claiming under him had never been adverse to the title of the railroad company. The contention was based upon two grounds.

(1) That after the sale and conveyance of the property in the bankruptcy proceedings, Hicks was a mere tenant by sufferance, holding in subordination to the title of the railroad company; and

(2) That when he claimed title in himself Hicks was a mere squatter without a scintilla of title.

In disposing of the second ground Judge Buchanan, speaking for the whole court, said:

> "It may be true, as contended, that Hicks, when he denied the title of the appellant, and asserted ownership in himself, did not have a scintilla of title to the land. The question in cases of adverse possession is not whether the claim asserted is good or bad, but whether there has been a hostile claim of title and continuous possession under it for the statutory period. Neither is it necessary that such hostile claim should be under color of title; that is under deed or other writing. But where it is a mere claim, that is, a mere assertion of a right without any paper title, the adverse holding is limited to the actual enclosure of the claimant, citing *inter alia*. *Kinchloe* v. *Tracewell*, 11 Gratt. 605; and *Sulphur Mines Co.* v. *Thompson*, 93 Va. 319."

See also *Probst* v. *Board of Missions*, 129 U. S. 182.

While Judge Buchanan, in the paragraph above quoted, uses the expression actual enclosure, it is apparent from the cases he cites that what he meant was actual possession. It happened that the lot of land with which he was then dealing was enclosed by a fence, and that was a convenient method of showing the extent of Hicks' claim and possession. The same learned Judge, as we shall presently see, in *Sulphur Mines Co.* v. *Thompson*, *supra*, approved an instruction to the effect that enclosure by fence was not necessary to the acquisition of title by adverse possession, and that, too, in a case where the occupant was without color of title, and held under a naked claim. And *Sulphur Mines Company* v. *Thompson* is one of the cases he cites with approval in this case. In *Kinchloe* v. *Tracewell*, the other case cited above, this point was not involved.

What is meant by "claim of right" and the character of claim that will support title by adverse possession will be more fully discussed later in this brief when we come to deal with appellant's contention that appellee's possession was not with claim of right.

In the next succeeding paragraph we shall show that Virginia, in common with the other States of the Union, recognizes the rule that—

Enclosure Is Unnecessary.

It is universally held in America that in order to the acquisition of title by adverse possession, it is not necessary that the land be actually enclosed.

> "Except in one State, Tennessee, it is not necessary to constitute actual possession that there should be an enclosure of the premises unless this is required by statute."
>
> *Corpus Juris*, Vol. II, p. 60.

Even in Tennessee, the one exception noted in the above quotation from *Corpus Juris*, the cases on which that exception rested have been overruled, and it is now held that enclosure is not necessary to establish title by adverse possession. *Bensdorf* v. *Uihlein* (Tenn.) 177, S. W. 481.

The precise question, viz.: whether enclosure is necessary where the possession rests upon a mere claim without color of title was before the Supreme Court of Appeals of Virginia in the case of *Sulphur Mines Company* v. *Thompson, supra.*

In that case, as hereinabove noted, the defendant claimed title by adverse possession to the twenty-five acres of land in controversy. It had no color of title and its possession rested upon a mere naked claim. The record on file in the Clerk's Office of the Supreme Court of Appeals discloses that only about five acres of the land had ever been fenced. The balance of the tract was unenclosed. The defendant's possession rested on ordinary acts of ownership, such as cutting timber, and taking of minerals.

The trial Court had granted among other instructions, the following, designated as Defendant's Instruction No. 3:

> "The court further instructs the jury that the exercise by the defendant, or those under whom it claims, of open, notorious and habitual acts of ownership over the land in controversy, is sufficient evidence of possession, and it is not necessary to such possession that the land should be enclosed, or built upon, or actually cultivated or cleared."

This instruction was approved on appeal. The judgment of the Court below was reversed on other grounds. In remanding the case for a new trial, the Court reviewed the action of the trial Court in granting and refusing instructions. It was said that Defendant's Instructions 9 and 10, which had no bearing on this point, were properly refused; but that the instructions granted by the Court below correctly stated the law. Thus at p. 321, Judge Buchanan, speaking for a unanimous court, said:

> "Without discussing in detail the action of the court in giving and refusing the other instructions given and refused, it is sufficeint to say that under the facts of this case, the rulings of the court upon these instructions were correct."

The question has, therefore, been settled in Virginia that enclosure is not necessary to adverse possession, even where the occupant is without color of title, and holds under a naked claim.

In so holding Virginia but adheres to the universal rule on the subject. Perhaps no better statement of the rule can be found, than that of Mr. Justice Field in *Zeilin* v. *Rogers*, 21 Fed. 103.

> "Neither residence upon land nor its inclosure by artificial means is absolutely necessary to create an adverse possession, even where the premises are not claimed under color of title. Either of these circumstances is strong evidence to establish such possession; but it may be shown in other ways. A subjection of the land by the claimants to such uses as it is ordinarily susceptible of, to the exclusion of others is an adverse possession; and that subjection may appear by its cultivation or occupation for the ordinary purposes of husbandry or pasturage. The extent of the land to which an adverse possession is claimed must, of course, be clearly indicated, so that others may see and respect it; but it need not be shown by an artificial inclosure. — — — The subjection of the land to the uses of the claimant, to the exclusion of others, and the identification with reasonable certainty, according to the circumstances of the case, in some

> visible or appreciable way, of its extent, are the material facts necessary to establish the adverse character of the possession. In many decisions an inclosure is spoken of as essential, because the limits of the land in controversy could only be marked conveniently in that way. But the essential fact is the indication, given by the inclosure, of the limit to which the possession claimed extends. None of the authorities deny the equal efficacy with an artificial inclosure of other defined boundaries or means of indicating the limits of a tract to which the possession of an occupant extends."

See also *Lyons* v. *Fairmont Real Estate Co.* (W. Va.), 77 S. E. 525; and *Wade* v. *McDougle* (W. Va.), 52 S. E. 1026.

Meaning of Actual Possession.

By actual possession as used in this connection is meant only that the adverse claimant shall have openly exercised habitual acts of ownership over the property, and made such uses of it as it is ordinarily susceptible of. Residence upon it and enclosure by physical means are not required.

> "A subjection of land by claimant to such uses as it is ordinarily susceptible of, to the exclusion of others, is an adverse possession."

Mr. Justice Field in *Zeilin* v. *Rogers, supra.*

This is the rule in Virginia.

The learned Counsel for the appellant at page 15

of his brief quotes from the opinion of Judge Baldwin in *Taylor* v. *Burnside*, 1 Gratt. 165. But unfortunately the quotation gives only a part of Judge Baldwin's statement of what may constitute actual possession.

The full quotation follows; and we have taken the liberty of printing in italics the portion omitted by Counsel for the appellant.

> "An adversary possession must also be actual in reference to the means by which it was acquired. In that sense, I understand an actual possession to be the occupation, use or enjoyment of the subject matter in controversy by residence, cultivation, improvement or other open, notorious and habitual acts of ownership. These modes of occupation, use or enjoyment, residence, cultivation and improvement, while they continue are usually the most obvious and most decisive. *But there may be other open, notorious and habitual acts of ownership of quite equivalent import and effect. Take, for example, the case of a town resident who, claiming title to a lot or tract of woodland in the vicinity, openly, notoriously and habitually cuts and hauls from it his necessary supplies of fuel; or, in like manner, makes it a source of revenue by sales of fire-wood or timber; or the case of an unenclosed or unimproved lot in or near a city devoted by the professed owner to his use or profit as a coal or lumber yard, quarry or landing place. There cannot be stronger evidence of actual possession than these and other like cases which might be stated, but they can only serve for the purpose of illustration. When we leave the unquestionable tests of residence, cultivation and improvement, every case must depend in a great measure upon its own circumstances, and*

requires a recurrence to the general principle above stated of open, notorious and habitual acts of ownership."

And as we have seen above, the Supreme Court of Appeals of Virginia, in *Sulphur Mines Co.* v. *Thompson*, approved an instruction which told the jury that:

> "The exercise of open, notorious and habitual acts of ownership over the land in controversy is sufficient evidence of possession, and it is not necessary to such possession that the land should be enclosed, built upon or actually cultivated or cleared."

In that case the adverse claimant had at the beginning of its occupancy neither title nor color of title. It merely asserted a claim to the land without paper title of any kind. This assertion of a claim constituted its "claim of right."

Payment of Taxes.

The payment of taxes is not an element of adverse possession unless made so by express statutory requrement.

> *Cyc. Vol. I, p. 1106.*
> *Corpus Juris, Vol. II, p. 203.*

There is no such statute in Virginia. The payment of taxes is, therefore, not necessary to the acquisition of title by adverse possession.

The question of taxes is not involved in this

litigation, there being no unpaid taxes assessed against the property.

APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.

The findings of the Court below so far as they relate to the character and duration of plaintiff-appellee's possession of the land in dispute, and to appellant's conduct with respect to said land will be found in the Appendix at the end of this brief.

Appellee's Possession Met all Requirements of the Law.

Counsel for appellant appears to concede that appellee's possession met all legal requirements to confer title except two. At page 15 of his brief, he says: "two of the essentials of adverse possession were not present." These were, as contended by counsel, (1) that prior to 1907, appellee was never in actual possession of the land; and (2) at no time did it have a claim of right or title thereto.

It seems unnecessary therefore to discuss at length any feature of appellee's possession other than the two whose sufficiency is thus challenged. Hence we shall at this point content ourselves with pointing out briefly that that possession met every requirement of the law, reserving for fuller discussion later herein, the two objections urged against it by counsel for the appellant.

That possession was:

(a) *Actual.* (For discussion of this point see page 26, *post.*)

(b) *Open and Notorious.*

Publicity matter issued by the Norfolk-Hampton Roads Company in 1899 advertised to the world that this land belonged to that company, and the company recorded plats of its property on which this land was included and indicated as a part of its holdings. In 1901, the company laid out its lands, including the "Prize Lot Reserve," into streets and lots for a suburban addition to the City of Norfolk; and a plat of that subdivision known as "Subdivision No. 1, Norfolk on the Roads" was recorded in the County Clerk's office on June 14, 1901. That plat, which included the "Prize Lot" land, bore the legend "Property of Norfolk-Hampton Roads Company." In connection with the laying out of this subdivision streets were opened and graded by the company, through the land of the Reserve. From 1899 until 1917, when it was taken by the Government, this land was held out and treated by the company as being its own property. So notorious was this fact, so generally was its possession and ownership recognized in the community, that the Jamestown Exposition Company, a *quasi* public corporation, in 1907 occupied this land as lessee of Norfolk-Hampton Roads Company under formal lease from that company. Finding VII.

(c) *Continuous and Uninterrupted for More than the Statutory Period and Exclusive.*

There is no claim that any person other than Norfolk-Hampton Roads Company, or a lessee of that company, was ever in possession of this land at any time between 1899 and its taking by the Government in 1917. The Vue de L'Eau Company was still wrapped in the slumber into which it passed in 1874, a slumber from which it was never aroused until 1921, four years after title and possession were taken by the United States. The language of Finding VII dealing with the time during which plaintiff-appellee exercised absolute dominion over this property, is—"From thenceforward (1899) to the time of its taking by the Government in June 1917." Clearer language could not have been employed. It shows that there was never a break in appellee's possession of this land and that that possession was exclusive.

If it could have been shown that any person other than Norfolk-Hampton Roads Company or its lessee was ever in possession of the property during that period we may be sure it would have been done.

(d) *Hostile.*

Plaintiff-appellee's possession was never held in subordination to the title of Vue de L'Eau Company, or any other person; but in open defiance to the owner of the record title, and to the exclusion of such owner and all other persons. It was therefore *hostile* within the meaning of the law on this subject.

(e) *Under a Claim of Right.* (For discussion of this point see page 32, *post.*)

DISCUSSION OF OBJECTIONS URGED BY APPELLANT AGAINST APPELLEE'S TITLE

As above noted appellant denies the sufficiency of appellee's possession to confer title in two particulars, claiming that the actual possession dated only from 1907, and that the possession was without claim of right.

In addition to this, counsel suggests, that the land in question was not susceptible of adverse possession, because, as he intimates, in a complete state of nature.

We shall reply to this suggestion before taking up the discussion of the two objections above noted.

Land Not in a State of Nature.

The rule by which appellant seeks to obviate the effect of claimant's possession is stated on page 15 of its brief:

> "Wild and uncultivated lands cannot be made the subject of adversary possession *while they remain completely in a state of nature.* A change in their condition, *to some extent*, is therefore essential; and the acts by which it is effected are often the strongest evidences of actual possession."

It will be noted that such lands are excepted only when *completely* in a state of nature; and that even wild ands require a change only *to some extent.* The exact

extent is not defined, and it is submitted that any change whatever will remove them from such classification.

The very term "complete state of nature" makes untenable the theory that property once removed from that category could revert thereto—certainly within the space of a few years.

Nor is the rule ever applied in a case of actual possession. The fact that the land is completely in a state of nature is usually taken as evidence that there has been no one in possession. But if actual possession can be shown even in the case of wild lands, the statute will run. This is clearly shown in the case of *Chilton* v. *White* (W. Va.), 78 S. E. 1048, cited by Counsel for the appellant.

> "There can be no adverse possession of wild lands as against the superior title *unless* such possession is *actual, exclusive, visible and notorious.*"

It is idle for appellant to claim that the "Prize Lot Area" or any part of the "Pine Grove Block" was in a state of nature. The tract was part of a valuable farm when conveyed to the Vue de L'Eau Company in 1871; the company in 1873 laid off this identical tract into streets and town lots for suburban homes.

The statement in Finding VI that after the Vue de L'Eau Company made its general assignment in 1874, it did nothing further with reference to this land, and that the same was allowed to further develop forest growth thereon has reference to the time when that company ceased to function in 1874.

But assuming for the sake of argument that this tract was in a complete state of nature in 1899, Norfolk-Hampton Roads Company immediately effected extensive changes in the condition of the property—not merely changes "to some extent." It took possession of it, cut and marketed timber from it, and built bulkheads along the water front to protect it from the action of the water. It laid it out in streets and building lots in 1901 as a suburban addition to the City of Norfolk.

With these and other facts in the record, even assuming the land to have been in a "complete state of nature" in 1899, it is certain that claimant did much more than effect a change in its condition "to some extent." It wrought a complete transformation therein.

Appellant cites *City of Richmond* v. *Jones*, 111 Va. 214, 217. This was a case of an attempt to claim title by adverse possession to an island in the James River. The island was in a complete state of nature—no changes having been wrought in its condition by the hand of man—and the adverse claimant had never been in *actual possession* thereof; nor had he occupied, improved, or cultivated it, or exercised any acts of ownership over it. The case is not in point.

Whealton v. *Doughty*, 112 Va. 649, applied to marsh lands on the sea shore; adverse claimant was not in actual possession of the property, and the only acts of ownership consisted of occasional roaming of cattle over the lands and the cutting of grass. Again not in point.

Providence, &c., Club v. *Miller Manufacturing Co.*, 117 Va. 129, is also entirely inapplicable here.

Counsel dwells somewhat at length on the case of *Craig-Giles Iron Co.* v. *Wickline*, 126 Va. 223, and evi-

dently regards the facts therein as being in some remote way similar to those of the case at bar. That they are in no way similar is shown by the statement of Judge Kelly, found in the body of the opinion (129 Va., at page 231):

> "The only affirmative acts of ownership exercised on the land, until defendants entered thereon in 1914 or 1915, were the cutting of timber therefrom *at remote intervals.*" (Italics ours.)

There was no actual possession in that case until defendant entered on the land in 1914 or 1915. In the instant case, as is shown by the Record, plaintiff-appellee was in actual possession from 1899 to June 28, 1917. The case has practically nothing in common with the case at bar.

This is also true of *Chilton* v. *White* (W. Va.), 78 S. E. In none of the cases relied on by the appellant was actual possession shown.

This brings us to the two principal contentions made on behalf of appellant, viz.: (1) that appellee's possession did not begin until the year 1907, and (2) that its possession was not under a claim of right. These will be dealt with in the order stated.

Character and Duration of Appellee's Possession.

We have already shown that this possession was open and notorious, continuous, uninterrupted, exclusive and hostile. The attention of the Court is here invited to the fact that it was *actual* and that it began in 1899 and continued until the property was taken by the Government in 1917.

The Court of Claims found that upon purchasing in 1899 the extensive tract of land contiguous to the "Prize Lot Reserve" and completely enclosing the same on its land sides, Norfolk-Hampton Roads Company deliberately set about acquiring the title to said Reserve "by adverse possession." Naturally the first step in such a program would be the *possession;* and that the Court finds the plaintiff-appellee took and held as follows:

> "The plaintiff company, upon its purchase, in 1899, of its large holdings of land inclosing said "Prize Lot Reserve" on its land sides, took possession of said holdings and from thenceforward to the time of its taking by the Government *in* June, 1917, treated the land of said Reserve as though it belonged to the plaintiff company. It recorded plats of its said property in which the land of said Reserve was included and indicated as a part of the company's holdings. The company's advertising matter issued in 1899 indicated as belonging to the company lands which included the lands of said Reserve, and said land was included in the company's subdivision known as "Subdivision No. 1, Norfolk on the Roads," a plat of which, stating said subdivision to be the "Property of Norfolk-Hampton Roads Company," was recorded in the County Clerk's office on June 14, 1901. In the development of its said property, streets were opened and graded through the land of said Reserve; timber was cut therefrom and used or marketed by the company; and bulkheads were built by the company in front of the property to protect it from erosion by the waves and tides. Said company also leased an area of its lands to the Jamestown Ex-

> position Company, in ~~1917~~ 1907, including therewith said "Prize Lot Reserve" land as belonging to plaintiff company, and thereafter, upon the termination of the Exposition Company's lease, said lands were leased by plaintiff company to another tenant, by whom they were occupied for some time. And in general, the land of said Reserve was held out and treated by plaintiff company as being the property of said company."—Finding VII.

This language is, we submit, susceptible of no other meaning than that the plaintiff-appellee was in the *actual* possession of the land in question from 1899 until it was taken by the Government in 1917.

It held this land as it held its other contiguous property which completely hemmed it in on its land sides, and treated it the same. All was in its actual possession. Following the statement that from 1899 until the property was taken by the Government in 1917, the plaintiff company treated this land as though it belonged to itself, is an enumeration of some of the acts of ownership and dominion exercised over the land of the Reserve in the course of its possession. They are not to be treated as Counsel undertakes to treat them, as a specification of particular and isolated acts, but as illustrations of the character of the dominion exercised over the property by plaintiff-appellee throughout the period covered by the expression "From thenceforward (1899) to the time of its taking by the Government in June, 1917."

Counsel for appellant at pages 8 and 9 of his brief undertakes to dissect and dismember Finding VII; to detach each characteristic or illustrative act from its

context, and treat each as though it were an isolated fact—merely an occasional trespass.

It is, of course, good military strategy to break up the enemy into small detachments, and beat him in detail when possible; but this method is not permissible in dialectics—certainly not in dealing with a body of facts on which a Court of Justice has based its judgment.

On the combined effect of this statement of facts grouped as they are and taken as a whole, the Court of Claims based its judgment.

In the same manner the finding must be treated on appeal.

In *United States* v. *Pugh*, 99 U. S. 265, the Court of Claims found, not the ultimate fact on which alone its judgment could be sustained; but the circumstantial facts from which the ultimate fact could fairly be inferred. In answering the objection that this did not comply with the rule requiring the facts and not the evidence to be certified, Mr. Chief Justice Waite said:

> "This would not require us on the appeal to decide upon the weight of evidence. That is done in the court below, when the particular fact is found which the evidence tends to prove. The effect of mere evidence stops when the fact it proves is established. After that the question is as to the effect of the fact; and when the evidence in a case has performed its part and brought out all the facts that have been proved, these facts thus established are to be *grouped*, and their legal effect *as a whole*, determined." (Italics ours.)

The learned Chief Justice also said (p. 270) that whether the facts found establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law.

> Cited in *McClure* v. *United States*, 116 U. S. 145.
> See, also, *United States* v. *Andrews*, 179 U. S. 96.

Even if it were true, as contended by appellant's Counsel, that the findings of fact in the instant case stop short of stating *expressly* the ultimate fact of actual possession; yet upon the authority of *United States* v. *Pugh*, *supra*, the findings are sufficient to support the judgment. They are, to say the least, the legal equivalent of an express finding of possession. They show that from 1899 until the property was taken in 1917, plaintiff-appellee exercised a dominion and control that are possible only to one in possession.

Even if the facts found in this case were to be treated only as circumstantial facts, yet it is submitted that under the law of Virginia, which allows *possession* to be proved by evidence of just such acts as are here mentioned, they are sufficient to support the judgment.

As noted earlier in this brief, in the case of *Sulphur Mines Company* v. *Thompson*, 93 Va. 293, a case cited on behalf of appellant, the Supreme Court of Appeals approved an instruction in this language:

> "The court further instructs the jury that the exercise by the defendant, or those under whom it claims, of open, notorious and habitual acts of ownership over the land in controversy, is sufficient evidence of possession, and it is not

> necessary to such possession that the land should be enclosed, or built upon, or actually cultivated or cleared."

It is respectfully submitted that if the exercise of open, notorious and habitual acts of ownership, is *sufficient evidence of possession;* and the highest court of Virginia has said that it is, then the fact of possession for more than the statutory period is conclusively shown by the findings in this case.

We may add that if the findings were open to two constructions, one of which would sustain the judgment, and the other render it void, it would be the duty of this Court, under well established principles, to adopt that construction which will uphold the judgment.

United States v. *Andrews*, 179 U. S. 96.

In that case Mr. Justice Peckham, in disposing of the contention that the findings of fact were not sufficient to sustain the judgment, said:

> "While the finding might have been more definite and therefore more satisfactory, yet within the well-known rules governing the construction of findings of facts by trial courts, we cannot so construe it as to render the result arrived at by the court below erroneous, when another construction much more reasonable and natural may be given it, and the judgment thus rendered valid."

Plaintiff-Appellee's Possession was Under a Claim of Right.

We have already seen that upon taking possession in 1899, Norfolk-Hampton Roads Company asserted a claim to the land of the "Prize Lot Reserve" in the most public manner possible. It advertised the property as belonging to it; it recorded plats on which this property was indicated as its own; it subdivided it into lots and streets, by its plat known as "Subdivision No. 1, Norfolk-on-the-Roads, Property of Norfolk-Hampton Roads Company," which plat was recorded in the County Clerk's office of Norfolk County on June 14, 1901, and so notorious was its claim of ownership, so generally was its title acknowledged, that Jamestown Exposition Company, in 1907, recognized it as the owner, and obtained from it a lease of the property. Finding VII.

There could be no mistaking the intention with which it held this property. It claimed it as its own. The sufficiency of this claim is challenged by appellant.

At page 27 of his brief, the learned Counsel for the appellant says:

> "We submit that Norfolk-Hampton Roads Company had no claim of right or title to this land; but was a wrong doer from the outset."

This statement evinces a curious misconception of the meaning of the term "claim of right" as used in connection with title by adverse possession. It assumes that a possession originally wrongful could never ripen into title, whereas it has been repeatedly recog-

nized in Virginia that it can and does, and as was said by Mitchel, J., in *Carpenter* v. *Coles*, et al. (Min.), 77 N. W. 424, presently to be cited:

> "The books are full of cases where tortious entries upon and possession of land without any pretense of title or rightful claim have ripened into title by adverse possession."

Apparently the learned counsel confuses claim of right with color of title. Color of title is always founded upon a deed or other instrument in writing. A claim of right need not be founded upon anything whatsoever. It is purely subjective and consists of the intent with which the dissessor holds.

The practical difference between possession under color of title and possession under a mere claim of right has already been discussed. Here we are concerned only with the meaning of the term claim of right as used in connection with title by adverse possession.

Meaning of Claim of Right.

Claim of right as used in this connection *does not mean a rightful claim.*

It merely means that one claims a right. Claim of right and claim of title are used interchangeably and mean the same thing, viz., that the disseizor claims the property as his own. The claim may be wholly unfounded. Nor is it in any case necessary that the disseizor shall have *believed* his claim good. As we shall presently see, the question of good faith is wholly immaterial in cases of actual possession.

For in Virginia, as elsewhere—unless otherwise provided by statute, as it is in the State of Washington—

> "It is immaterial whether the claim of right be *true* or *false*, *good* or *bad*, in the first instance; but if there is a mere claim, without color of title, the adverse holding of the occupant is always confined to that portion of the land actually occupied."
>
> *Minor on Real Property, Sec. 1035, p. 1112.*

> "If one, either of set purpose or with entire indifference to the rights of his neighbor, builds upon, or otherwise occupies openly and notoriously his neighbor's land, there is no doubt but that this constitutes an adverse possession which will ripen after the lapse of the statutory period into a perfect legal title."
>
> *Minor on Real Property*, § 1036, p. 1113.
> *Brock v. Bear et als*, 100 Va. 562, 565.

In *Brock* v. *Bear*, *supra*, one without any right, title or color of title erected a building on land of a coterminous owner. His possession originated in a naked trespass.

Held, that after the lapse of the statutory period his title by adverse possession was complete.

It was contended by the owner of the record title that the erection of the building on his land occurred through a mistake of the boundary lines and with no intention on the part of the occupant of claiming the land beyond his own line.

In disposing of this contention Judge Harrison of the Supreme Court of Appeals of Virginia said:

> "It is true that adverse possession depends upon the intention with which the possession is taken and held, but while the intention to claim title must be manifest it need not, be expressed. The intention to claim and hold title is often best shown by the act of the parties, and their manner of occupancy. It would be difficult to conceive of a more unequivocal determination to take and hold title to land up to a given line than to erect costly buildings upon the land up to that line and use and occupy the same for years in the face of all persons who could question the right."

To the effect that adverse possession depends upon the intention with which the possession is taken and held; and that while the intention to claim title must be manifest but need not be expressed, see also *Haney* v. *Breeden*, 100 Va. 781.

Not Necessary to the Aquisition of Title that a Disseizor in Actual Possession shall have Believed his Claim or Title Good.

No case in Virginia has held that in order to acquire title by adverse possession of land in his *actual* possession the disseizor must have believed his title good.

The contrary is *expressly* held in the recent case of *Cochran* v. *Hiden*, 130 Va. 123.

Here it is said that not even good faith in taking

and holding possession is essential to the acquisition of title by adverse possession to the land in the actual possession of the disseizor; and that it is only where a purchaser relies upon *constructive* possession arising from the color of title given by his deed, that his claim of title need be *bona fide*.

That this has always been the law of Virginia is apparent from the cases in which a possession originating in wilful trespass has been held to ripen into title.

The case of *Virginia Midland R. Co.* v. *Barbour*, 97 Va. 118, cited by counsel for appellant at page 29 of his brief, well illustrates the point. In that case Hicks, the disseizor, claimed the disputed property against his own grant. He had previously conveyed it to his assignee in bankruptcy under the Bankruptcy Law of 1868. The assignee had sold it to the railroad company. Hicks retained possession and when the railroad company sent its agent to take possession, Hicks met him with shot-gun in hand and drove him from the premises, declaring that the property belonged to him. Hicks could have had no reason in the world for believing his claim valid; yet after the lapse of the statutory period his title was held good.

In the instant case the possession was *actual*, not constructive. The question of the *bona fides* or *mala fides* of the claim of title is therefore wholly immaterial.

In holding that it is the *intention to hold* the property as against the owner of the record title that constitutes the "claim of right," or "claim of title" essential to the acquisition of title by adverse possession; and that as respects land in the actual pos-

session of the disseizor, that claim need not be *bona fide*, in the sense that the disseizor must have had a valid claim to the property, or believed he had, the Virginia Court is in harmony with the text writers and with the decided cases in other jurisdictions.

A few examples will suffice.

Sedgwick & Wait on Trial of Title of Land, Para. 758, states the rule as follows:

> "The adverse intention of the tenant, in the absence of proof of his own admissions to the contrary, or other proof that his possession was only permissive, or in fact without hostile intent, may be generally evidenced by the character of his possession and acts of ownership. If these are sufficiently definite, open, and exclusive, it will be presumed that they are done with the intent to appropriate the land. By such acts, it is said, the party proclaims to the public an exclusive *ownership over the land.*"

In *Chicago & N. W. Ry. Co. et al.* v. *Groh* (Wis.), 55 N. W. 714, 715, the following instruction was held to correctly state the law:

> "The words 'under claim of title' are not to be taken to mean that it is necessary that Groh should have thought the land belonged to him before he entered, but if he went onto it with the intention to claim it, and keep it as his, without knowing or caring who else claimed to own it, *that would be an entry under claim of title.*"

Chief Justice Lyon, in approving this instruction, said:

> "It is a sufficient claim of title that the entry of the disseizor is hostile to all the world, and he intends to hold the land as his own, and does so hold it for the statutory period of limitation."

The evidence in that case showed that Groh entered upon land without knowing or caring who owned it, and remained there for the statutory period.

In *Rennert* v. *Shirk* (Ind.), 72 N. E. 546, Judge Monk says:

> "To be adverse, possession must be actual, open, and notorious, exclusive, continuous, and under claim of right, *that is, an intention to claim adversely.*" * * * *
>
> "It is not necessary that appellees and those through whom they claim, or any of them ever made oral declaration of such claim of right. It may be inferred from the manner of the occupancy. The same, as well as all the other elements of adverse possession, may be shown by positive acts of ownership inconsistent with the title and possession of the true owner of the real estate in controversy, such as erecting, repairing and occupying the buildings on said real estate, leasing the same and collecting the rents, selling and conveying, and offering to sell and convey said property as improved."

The learned Judge here cites thirty-eight text-writers and decisions in support of this principle.

The rule is thus stated in *La Frombois* v. *Jackson*, 8 Cow. 508, 603, 18 Am. Dec. 463:

> "The actual possession and improvement of the premises as owners are accustomed to possess and improve their estate, without any payment of rent, recognition of title in another, or disavowal of a title in himself, will, in the absence of all other evidence, be sufficient to raise a presumption of his entry and holding as absolute owner, and unless rebutted by other evidence, *will establish the fact of claim of title.*"

and further:

> "Every possession, then, is adverse, and entitled to the peaceful and benignant operation and protecting safeguard of the statute, which is not in subservience to the title of another, either by a direct acknowledgement of some kind, or an open or tacit disavowal of right on the part of the occupant; and it is the latter case only that the law adjudges the possession of one to the benefit of another."

Of all of the cases from jurisdictions other than Virginia, none is more instructive than that of *Carpenter* v. *Coles, et al.* (Minn.), 77 N. W. 424. The lower court in that case, as shown by the instructions granted, held precisely the same view that is so ardently contended for by Counsel for the Appellant. The case so aptly illustrates the point under discussion that we take the liberty of quoting therefrom at length.

In the trial below the Court had instructed the jury among other things, that:

> "A person has not any right, arbitrarily and without any claim of right, knowing that he has no right whatever, to go and take with a high hand wrongful possession of land, and avail himself of the statute of limitation."

Also:

> "A person cannot view a piece of land that he has no kind of interest in, no title to, and enter upon it with a view of occupying it fifteen years wrongfully and without any claim of right, with a view of invoking the statute of limitations."

This instruction was held *erroneous*, the judgment reversed, and the cause remanded for a new trial.

Mitchell, J., speaking for the Court, said of the instructions:

> "The meaning of these instructions is that the statute will never run in favor of a disseizor whose adverse possession originated in a naked and wilful trespass; that to set the statute in motion the entry must have been made under some color or claim of title which the disseizor claimed gave him the legal right to enter. This is clearly incorrect, for *the books are full of cases where tortious entries upon and possession of land without any pretense of title or rightful claim to the land have ripened into title of adverse possession.* 'A disseizor,' says Lord Coke, 'is where one enters intending to usurp the possession, and to oust another of his freehold.' *So the whole inquiry is reduced to the fact of entering and the*

intent of the disseizor to usurp possession for himself to the exclusion of others. Wherever the proof is that the one in possession entered and holds for himself to the exclusion of all others, the possession so held is adverse, and, if such possession is continued the sufficient length of time, it will ripen into title, regardless of the good faith or the bad faith of the disseizor, or whether he claimed the legal right to enter, or avowed himself a wrongdoer. The two essential elements are possession and adverse intent. The misapprehension on the subject arises from the somewhat misleading, if not inaccurate, terms frequently used in the books to express this adverse intent, such as '*claim of right*,' '*claim of title*,' and '*claim of ownership*.' *These terms, when used in this connection, mean nothing more than the intention of the disseizor to appropriate and use the land as his own to the exclusion of all others. To make a disseizin it is not necessary that the disseizor should enter under color of title, or should either believe or assert that he had a right to enter.* It is only necessary that he enter and take possession of the lands as if they were his own, and with the intention of holding for himself to the exclusion of all others. This appropriation once made, and possession once begun, *the presence or absence of good faith of the possessor, or whether the possession originated in a naked trespass, or was taken under color or claim of title, is wholly immaterial.* The question of color of title is only material in so far as the possession claimed is derived from and depends upon the instrument constituting the color of title; that is, it applies only to the constructive possession which such an instrument gives the claimant under it." See Sedg. & W. Land Title, c. 29; *Bryan* v. *Atwater*, 5 Day, 181. (Italics ours).

THE MORAL ISSUE.

The Appellant, at page 28 of its brief, attempts to raise a moral issue in connection with the assertion of title to this land. That issue could be raised in almost every case of adverse possession that may occur. For in all such cases the occupant claims against the true owner of the property. And yet statutes of limitation exist in all civilized countries. They exist because there is *another side* to this moral question; and that is, that when one enters upon land and is permitted to occupy it for a long period, without interruption, and care for and improve it, it is inequitable not to say immoral to permit the owner of the record title to repossess himself of the land and reap the fruits of another's labor and expense.

A statute of limitations is a "Statute of repose." It is to the interest of the public, no less than that of the individuals involved, that such questions be put at rest.

This property was abandoned by its owners as worthless. When taken from Plaintiff-Appellant it was of great value.

It will not do to answer that The Vue de L'Eau Company was asleep. Grice, at whose instance, Guaranty Title & Trust Corporation was appointed receiver for that company, has always resided in that locality. If he was ever going to assert a claim to this land he should have done it years ago.

> **"An owner of premises is presumed to know the true location of his boundaries and is bound to take notice of the nature and extent of possession by a claimant."**

2 Corpus Juris, 268;
Brownson v. *Scanlan*, 59 Tex. 222.

> "He is not in the condition of an ordinary and casual observer, but must diligently look to his own interests, know the boundaries of his own land, and ascertain the extent, meaning and locality of any settlement made within them without his authority."

Willis, C. J., in *Brownson* v. *Scanlan*, *supra*.

Counsel for the Appellant appears to derive much comfort and satisfaction from the case of *Jasperson* v. *Scharenkow*, 150 Fed. 571, from which he quotes at length at page 30 of his brief. He admits that this decision rests upon a statute of the State of Washington which provides that possession, in order to ripen into title, must be under a claim and color of title "made in good faith."

But he overlooks the fact that the same Judge who decided that case, Circuit Judge Gilbert of the 9th Circuit, refused to follow it in the case of *Milwee et al.* v. *Waddleton*, 233 Fed. 989 (1916), for the reason above stated. What the former decision was based on is best stated in the Judge's own language.

> "The defendants say that plaintiff, after a judgment against him, could not claim title in good faith, and they cite *Jasperin* v. *Scharinkow*, 150 Fed. 571, and *Center* v. *Cady*, 184 Fed. 605. Those decisions were based upon a statute of the State of Washington (Ballinger's Ann. Codes & St. Para. 5503), which provided that one should

> be held to be adjudged the lawful owner of property if he were in actual, open, notorious possession of the same under a claim and color of title 'made in good faith,' and who should during said time pay all taxes legally assessed on said lands. There is no provision in the statute of Alaska that the claim should be made in good faith."

Neither is there any such statute in Virginia.

As we have already seen the Supreme Court of Appeals of Virginia has expressly held that good faith is not essential except in cases of constructive possession, *Cochran* v. *Hiden*, *supra*.

In *Virginia Midland R. Co.* v. *Barbour*, *supra*, Hicks, the disseizor, had formerly owned the property in controversy. He had taken advantage of the Bankrupt law, and in order to obtain a discharge from his debts had given up this identical property to his creditors and assigned it to his assignee in bankruptcy. The assignee had regularly sold and conveyed it to the railroad company. Hicks could have had no reason in the world for supposing he had any interest in it. He knew he had parted with the title irrevocably. And yet he remained in possession, asserted a claim to the property, and at the muzzle of a shot-gun drove the owner's agent from the premises. If, in the picturesque and somewhat facetious language of the learned Counsel for the appellant, the "Prize Lot" transaction was larcenous, then the conduct of Hicks, who used armed force to fend off the true owner, amounted to highway robbery. His title, however, at the end of the statutory period, was held complete.

Judge Buchanan in so holding said:

> "*The question in cases of adverse possession is not whether the claim asserted is good or bad, but whether there has been a hostile claim of title and continued possession under it for the statutory period.*" (Italics ours.)

The authorities, including the Supreme Court of Appeals of Virginia, therefore hold with entire unanimity, so far as we are aware, that in order to acquire title by adverse possession it is not necessary that the occupant have anything whatever to base his claim upon; that a "claim of right or title" in the sense of the law is nothing more than an intention existing in the mind of the disseizor to hold the property as his own; that it is unnecessary to have a valid claim or to believe he has; or to *have* any claim at all. The claim consists of his own intention to hold, and this need not be openly proclaimed or expressed; but is implied in his act of holding the property as his own, and without leave or license from another.

In the case at bar the claimant not only manifested its intention to claim and hold the property in controversy by the actual and exclusive occupancy of it for upwards of seventeen years without reference or regard to the owners of the record title; but it asserted its claim in the most public way by the publication and recordation of maps claiming the entire area as its own.

The fact is not to be overlooked, that as long as the property was in the shape of land no one con-

nected with the Vue de L'Eau Company manifested any interest in it, whatever. Then Norfolk-Hampton Roads Company might have it and care for it. Only after its conversion from land into a claim against the United States, and an opportunity to sue the Government, did even Grice display any interest. Had not the Government taken the land it would, without doubt, be in the possession of Norfolk-Hampton Roads Company or some one claiming under it to this day.

CONCLUSION.

It is respectfully submitted that there is no error in the judgment complained of, and that the same should be affirmed; and that Norfolk-Hampton Roads Company is entitled to and should have, a judgment against the appellant, and the sureties on its bond for damages and costs. It is to be borne in mind that the judgment in favor of Norfolk-Hampton Roads Company against the United States, payment of which was stopped by this appeal, bears no interest as against the United States. The damages awarded against appellant on affirmance should therefore be sufficient in any event to cover the interest on the amount of the judgment, $33,000, from the time the appeal was taken until the probable date when an appropriation can be had and payment of the judgment made.

Very respectfully submitted,

H. H. RUMBLE,
Attorney for Norfolk-Hampton Roads Company, Plaintiff-Appellee.

Of Counsel,
RUMBLE & RUMBLE,
Norfolk, Virginia.

APPENDIX.

Findings of Fact.

II.

On and prior to June 28, 1917, the plaintiff company was in possession of a certain tract or parcel of land designated as Pine Grove, situated in Tanners Creek Magisterial District of the County of Norfolk, State of Virginia, with all riparian and other rights appurtenant thereto, said parcel of land being adjacent to the tract of land known as the Jamestown Exposition Site, on Hampton Roads, Virginia, lying north of Ninety-Ninth Street and Algonquin Street, and being bounded as follows: On the north and west by the waters of Hampton Roads; on the east by the eastern line of Maryland Avenue; and on the south by One Hundred and Fourth Street and property known as the Deep Water Pier property, said parcel of land containing an area of 9.22 acres, more or less, and having a frontage of approximately 1400 feet on the shore line.

All of said parcel of land is located within the area described in the Act of Congress approved June 15, 1917, 40 Stat., 207 and said land, with the appurtenances and riparian rights belonging thereto, was taken by the President of the United States on June 28, 1917, under and pursuant to the terms of said Act of Congress, possession and control of said land being surrendered by plaintiff company to the United States on or before August 1, 1917. Thereafter, the President of the United States, acting pursuant to said Act of Congress, determined that just compensation

for said parcel of land, including appurtenances and riparian rights belonging thereto, but exclusive of buildings thereon not belonging to the owners of the land, was the sum of $37,000.00. Said sum was unsatisfactory to plaintiff company, and the payment of 75 per cent. of said sum, as provided for by said Act of Congress, was requested by plaintiff company, but the United States would make no payment whatever on said land on account of there being a question as to the validity of said company's title to a portion of said parcel of land, known as the "Prize Lot Reserve," consisting of 4.55 acres, more or less, with a frontage of about 690 feet on Hampton Roads.

III.

The said parcel of 9.22 acres of land described in Finding II had for several years immediately prior to the year 1874 belonging to the Vue de L'Eau Company, a company incorporated under the laws of the State of Virginia, being a part of a tract of about 294 acres of land owned by said company; and ownership of said parcel, with the exception of the said portion of it known as the "Prize Lot Reserve," was acquired by the plaintiff, the Norfolk-Hampton Roads Company, together with a large acreage of contiguous and adjacent lands, by purchase, about the year 1899, which ownership continued until said parcel of land was taken by the United States Government on June 28, 1917, as aforesaid.

The portion of said parcel of land so acquired by plaintiff company by purchase was 4.67 acres, more

or less, with a frontage of approximately 710 feet on Hampton Roads.

IV.

The said "Prize Lot Reserve" was located approximately midway of the Hampton Roads front of the said parcel of 9.22 acres of land described in Finding II, and for which recovery is sought in this suit. It may be more particularly described as follows, the evidence not furnishing a more definite description of it: (Here follows a detailed description of the property.)

Said "Prize Lot Reserve" consisted of lots and streets laid out by the said Vue de L'Eau Company about the year 1873, there being 16 lots fronting on Hampton Roads and 40 lots fronting on streets to the rear of the water front lots. In January, 1874, the said Vue de L'Eau Company executed a deed of assignment for the benefit of its creditors, whereby it conveyed to trustees under the assignment all of its lands and other property except the land embraced in the said "Prize Lot Reserve." So far as appears from the land records of said Norfolk County, the only sales or conveyance of lots or lands of said "Prize Lot Reserve" ever made by said company were the sales and conveyance to different persons, not parties to this suit, under date of August 1, 1873, of seven of said lots (description of lots sold follows).

V.

After its said assignment for the benefit of its creditors in 1874, the said Vue de L'Eau Company

apparently became dormant, no organization in the way of board of directors and officers being kept up; but no formal dissolution of the company or surrender of its charter appears ever to have taken place, and the legal existence of the company has recently been recognized by the Virginia courts by the appointment, by decree of April 12, 1921, of the intervenor in this suit, the Guaranty Title and Trust Corporation, as receiver of said company, with authority to take charge of the property of the company and to prosecute any claim or suits for the protection of its rights and interests.

VI.

No action with reference to the land and lots comprising the said "Prize Lot Reserve" appears to have been taken or in behalf of the said Vue de L'Eau Company from the time of the company's said assignment in 1874 for the benefit of its creditors until the appointment of a receiver for the company in April, 1921, as set forth in Finding V, and the receiver's intervention in this suit shortly thereafter, during said year 1921; and the said land and lots were allowed to remain in their former condition and to further develop forest growth thereon.

VII.

The said "Prize Lot Reserve" was inclosed on its land sides by a large acreage of land belonging to the plaintiff company, purchased by it in 1899, which in-

cluded the said 4.67 acres immediately surrounding said "Prize Lot Reserve," and involved in this suit; and upon purchasing said lands the plaintiff company, without any right, title or interest, or claim of right, title or interest, in or to the lots of land of said "Prize Lot Reserve," and with full knowledge of the fact that it had no claim of right, title or interest in or to any part of said lots or land, deliberately set about trying to acquire title to said lots and land by adverse possession; and in the course of its efforts to so acquire title thereto, the following action was taken:

The plaintiff company, upon its purchase, in 1899, of its large holdings of land inclosing said "Prize Lot Reserve" on its land side, took possession of said holdings and from thence forward to the time of its taking by the Government in June, 1917, treated the land of said Reserve as though it belonged to the plaintiff company. It recorded plats of its said property in which the land of said Reserve was included and indicated as a part of the company's holdings. The company's advertising matter issued in 1899 indicated as belonging to the company lands which included the lands of said Reserve, and said land was included in the company's subdivision known as "Subdivision No. 1, Norfolk on the Roads," a plat of which, stating said subdivision to be the "Property of Norfolk-Hampton Roads Company," was recorded in the Clerk's office on June 14, 1901. In the development of its said property, streets were opened and graded through the land of said Reserve; timber was cut therefrom and used or marketed by the company; and bulkheads were built by the company in front of the property to protect it from erosion by the waves and

tides. Said company also leased an area of its land to the Jamestown Exposition Company in 1907, including therewith said "Prize Lot Reserve" land as belonging to plaintiff company, and thereafter, upon the termination of the Exposition Company's lease, said lands were leased by plaintiff company to another tenant, by whom they were occupied for some time. And in general, the land said reserve was held out and treated by plaintiff company as being the property of said company. It does not satisfactorily appear who, if anyone, paid the taxes on said land between the years 1874 and 1917.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

GUARANTY TITLE & TRUST CORPORATION, receiver of Vue de L'Eau Company, a corporation, intervener, appellant,
v.
THE UNITED STATES.
No. 109.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Pursuant to the Act of Congress of June 15, 1917, Ch. 29, 40 Stat. 207, the United States took for a naval base a tract of land at Hampton Roads, Virginia, which was in the possession of the Norfolk-Hampton Roads Company. The compensation fixed by the President was unsatisfactory to that Company and it sued the United States in the Court of Claims. After the suit was brought the Guaranty Title & Trust Corporation, Receiver of Vue de L'Eau Company, by leave of court, intervened in that suit

alleging that it was the owner of a portion of the land taken and was, therefore, entitled to part of the compensation to be paid. The Court of Claims found that the value of the entire tract was $68,500, $35,500 being the value of the portion concededly owned by the Norfolk-Hampton Roads Company, and $33,000 being the value of the portion claimed by the Intervener (R. 14). The Court, however, held that the entire compensation should go to the Norfolk-Hampton Roads Company, entered judgment accordingly, and dismissed the petition of the Intervener (R. 15). The United States has not appealed from the judgment.

The Intervener appealed and by order of this Court made June 4, 1923, the Norfolk-Hampton Roads Company was admitted as a party appellee. The sum of $35,500, to which the Norfolk-Hampton Roads Company is concededly entitled, was paid to that Company by the United States. The only question presented upon this appeal is whether the balance of the judgment, $33,000, should be paid to that Company or to the Intervener, Guaranty Title & Trust Corporation, Receiver of the Vue de L'Eau Company.

The United States is, therefore, theoretically but a stakeholder. However, it found the property which it took in the possession of the Norfolk-Hampton Roads Company, its negotiations were with that Company, and by reason of the facts found by the Court of Claims and the arguments set

forth in the brief filed by counsel for that Company, we submit that the judgment of the Court of Claims was correct and should be affirmed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.

NOVEMBER, 1923.

○

IN THE

Supreme Court of the United States

October Term, 1923.

No. 109.

GUARANTY TITLE & TRUST CORPORATION, Receiver of VUE DE L'EAU COMPANY, a corporation, Intervenor, Appellant,

v.

THE UNITED STATES.

REPLY BRIEF ON BEHALF OF NORFOLK-HAMPTON ROADS COMPANY, APPELLEE.

Counsel for Appellant in his reply brief has in some instances introduced new matter not covered by his original brief and in others has changed front. For this reason we feel impelled to reply. This we shall do as briefly as possible, and in so doing, we crave the indulgence of the Court.

Open and Notorious Possession.

In his original brief counsel attacked the sufficiency of Appellee's possession on two grounds only.

Thus at page 13 he says:

> "We submit that two of the essentials of adverse possession were not present: (1) Prior to 1907 it was never in actual possession of this land; and (2) at no time did it have a claim of right or title thereto."

These contentions were fully dealt with in our brief.

In his Reply he now asserts that Appellee's possession is not shown to be *open*, *notorious* and *habitual*.

That a possession is *open* and *notorious* is in the nature of a conclusion from facts *proved* as to the character of the possession and the nature of the acts of dominion exercised over the property. Hence it was not necessary that the Court of Claims state in express terms that Plaintiff-Appellee's possession was open and notorious. It pursued the proper course in stating the fact of possession and the nature and character of the acts of dominion exercised over the property by the Plaintiff-Appellee.

As to what constitutes open and notorious possession, it is said in Corpus Juris, Vol. 2, p. 79, that

> "The general rule is that it is sufficient if the land is appropriated in such a manner as to apprise the community that the land is in the possession and enjoyment of the person claiming it, and that openness and exclusiveness are shown

> by such acts as will ordinarily be performed by the true owner in appropriating the land and its avails to his own use and preventing as far as practicable, all others from using it. * * * It is not essential that the occupation should be such as to inform a passing stranger that some one is asserting title to it."

See also *Lusk* v. *Pelter*, 101 Va. 790.

The facts found by the Court below show conclusively that Plaintiff-Appellee's possession was open and notorious.

Please see discussion at page 21 of our brief.

The findings also show that the dominion exercised by Norfolk-Hampton Roads Company over this property was not only habitual, but continuous, and its possession exclusive from 1899 until the property was taken in 1917. See Finding VII.

Counsel, at page 12 of his reply brief, says he does not see the relevancy of the fact that from 1874 until 1921, the Vue de L'Eau Company was dormant. For one thing, it shows that the Vue de L'Eau Company was never in possession of this property at any time after the year 1874.

Claim of Right.

In his original brief, page 27, counsel said:

> "Norfolk Hampton Roads Company had no claim of right or title to this land; but was a wrongdoer from the beginning."

Thus clearly indicating that a possession originally wrongful could never ripen into title to; other words, that a claim of right must have been a *rightful* claim.

In his reply, page 15, he shifts his position, conceding now that claim of right does not mean *rightful* claim.

But he contends, and here for the first time, that the Court of Claims expressly found that Norfolk-Hampton Roads Company did not hold possession under a claim of right.

In support of this he relies upon the first paragraph of Finding VII., where the Court said that upon purchasing its extensive land holdings contiguous to the "Prize Lot Reserve," in 1899, the Norfolk-Hampton Roads Company,

> "without any right, title, or interest, or claim of right, title or interest, in or to the lots of land of said Prize Lot Reserve, and with full knowledge of the fact that it had no claim of right, title or interest in or to any part of said lots or land, deliberately set about trying to acquire title to said lots and land by adverse possession.

The Court here was consciously and expressly dealing with the situation existing at the time of the purchase by Norfolk-Hampton Roads Company of the contiguous lands in 1899, the situation as it was when Appellee resolved to obtain title by adverse possession, and before it took possession.

This statement means nothing more than that when Norfolk-Hampton Roads Company bought the contiguous lands in 1899, it had no title to the Prize Lot Reserve, and knew that it had none.

Certainly it knew it. This was the reason for its determination to acquire the title. Moreover it knew that the only way it could acquire title was by adverse possession,the owner of the record title having then been dormant for a quarter of a century.

Hence it was that the Appellee immediately set about acquiring the title by adverse possession.

The remainder of Finding VII. shows that immediately thereafter and in 1899, Plaintiff-Appellee took possession of the land in dispute and asserted a claim to it in the most public manner possible by acts of record and otherwise.

> "As a general rule the claim of ownership need not exist at the time of entry and, where a person after entry sets up a claim of ownership, his possession may then become adverse, although the entry in the first instance was without claim of ownership."

2 Corpus Juris, page 129.

In the instant case the claim of ownership was immediately asserted in 1899. Thenceforward, until the Government took the property in 1917, the land of the Reserve was held out and treated by the Plaintiff-Appellee as though it belonged to itself. So generally was its claim and title recognized in the community that the Jamestown Exposition Company, in 1907, took a lease of the property from this appellee. Finding VII.

We have not conceded, as counsel at page 15 of his brief states, that a disseizor in order to acquire title by adverse possession must "*have* a claim of right." On the contrary, as we expressly stated in our brief at page 45,

> "A claim of right or title in the sense of the law is nothing more than an intention existing in the mind of the disseizor to hold the property as his own; that it is unnecessary to have a valid claim or believe he has, or to *have* any claim at all. The claim consists of his own intention to hold, and this need not be openly proclaimed or expressed; but is implied in his act of holding the property as his own without leave or license from another."

In the case of *Probst* v. *Board of Missions*, 129 U. S. p. 182, cited in our original brief, it was contended as it is in this case, that the disseizor was without claim of right. The trial court had instructed the jury that

> "Unless the defendant had a *right* to the possession of such lands when he took possession of them, he has no right now; time never makes a wrong right."

Mr. Justice Miller in holding this erroneous, said the right given by the statute of limitations

> "does not depend upon and has no necessary connection with the validity of the claim under which that possession is held. * * *
>
> Nor is it necessary that the defendant shall have a paper title under which he claims pos-

session. It is sufficient that he asserts ownership of the land and that this assertion is accompanied by an uninterrupted possession."

The case is so instructive and so fully sustains our contentions as to the character of the claim that will support adverse possession that we respectfully invite a full reading of Mr. Justice Miller's opinion.

Very respectfully submitted,

H. H. RUMBLE,
Attorney for Norfolk-Hampton Roads Company, Plaintiff-Appellee.

Of Counsel,

RUMBLE & RUMBLE,
Norfolk, Va.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 109

GUARANTY TITLE & TRUST CORPORATION, Receiver of VUE DE L'EAU COMPANY, a corporation, Intervenor, Appellant

v.

THE UNITED STATES.

REPLY BRIEF ON BEHALF OF APPELLANT

E. R. F. WELLS,

Attorney for Guaranty Title & Trust Corporation, Receiver of Vue de L'Eau Company, Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

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GUARANTY TITLE & TRUST CORPORATION, Receiver of VUE DE L'EAU COMPANY, a corporation, Intervenor, Appellant

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THE UNITED STATES.

REPLY BRIEF ON BEHALF OF APPELLANT

The limited time at our command since receiving a copy of the appellee's brief renders impossible an extended reply brief. We shall therefore consider only some of the main contentions advanced by the appellee.

A Question of Ownership:

It is contended by counsel for the Norfolk-Hampton Roads Company, plaintiff-appellee, (Appellee's Brief,

7, 8) that even if the actual possession of said Company did not begin until the year 1907, still in disturbing said Company's possession and in depriving said Company of the possession and use of said property and of the improvements which it may have made thereon after that date, the Government took from that Company property of value for which it was entitled to compensation. He then adds: "A judgment in its (said Company's) favor therefore could not be wholly wrong *even if the naked legal title had been in Vue de L'Eau Company at the time of the taking.*" (Italics ours.)

This contention is not sound. If actual possession of this land by Norfolk-Hampton Roads Company did not begin until the year 1907, then in June, 1917, when the Government took the property, that Company had not acquired title to it, had no right to the possession thereof, and was a mere trespasser. If it had made any improvements on the property (which the Court of Claims does not find as a fact) these improvements belong to the rightful owner of the land. Therefore, if we assume that at the time this property was taken by the Government in 1917 the Vue de L'Eau Company had the legal title thereto, then the Norfolk-Hampton Roads Company, although wrongfully in possession of the property, would not be entitled to any judgment whatsoever.

This whole case hinges on the question, "*Who was the owner of this property when the Government took it in June, 1917?*"

The Vue de L'Eau Company had a deed to it and was certainly the record owner; furthermore, it was in constructive possession of it unless it had been ousted

by the actual adverse possession of some one else. Unless the Norfolk-Hampton Roads Company had been in actual adverse possession of this land continuously for fifteen years prior to June, 1917, it had no title to it and no right to the possession of it.

No Actual Possession:

It is further contended by counsel for the plaintiff-appellee (Appellee's Brief 28) that the Court of Claims made a general finding that it (Norfolk-Hampton Roads Company) was in *actual possession* of said land from 1899 until it was taken by the Government in 1917, and that its specifications of the various acts done by said Company was simply an *enumeration* of *some* of its acts of ownership, which acts were mentioned simply as *illustrations* of the character of the dominion which said Company exercised over said property.

In passing, we suggest that this statement comes pretty close to being a concession that the specific acts mentioned by the Court of Claims are insufficient in and of themselves to constitute actual possession. His argument seems to be that this Court must assume that the Court of Claims held back and failed to mention other acts which might be sufficient to justify its conclusion.

Assuming, however, that the Court of Claims did make a general finding that said Company was in actual possession of the land during the entire period from 1899 to 1917, such a general finding would not be conclusive on the appellant. In *United States* v.

Pugh, 99 U. S. 265, it was held that if there was any doubt as to the legal effect of the facts found by the Court of Claims, it is the duty of that Court, when requested, to so frame its findings "as to put the doubtful question into the record."

In the case at Bar the "*doubtful question*" is whether the acts done by the Norfolk-Hampton Roads Company constituted actual possession. If the Court of Claims had contented itself with a general finding that said Company had actual possession of this land for the statutory period of time, then the appellant would have had the right to request said Court to state specifically the several acts done by said Company which it found constituted actual possession, and under the ruling in *United States* v. *Pugh* (supra), it would have been the duty of that Court to have complied with this request. But in the case at Bar, the Court of Claims did not simply make a general finding as to actual possession, but it specified—as was its duty to do—the various acts done by said Company, and we must assume that, in fairness to the appellant, it specified *all* of these acts so that the appellant could have the benefit of the judgment of this Court, on appeal, as to whether or not these acts were sufficient to constitute actual possession of the land.

Therefore, we do not think it is correct to say that the Court of Claims in its findings of fact simply enumerated *some* of these acts of ownership as *illustrations* of the character of the dominion exercised by the Norfolk-Hampton Roads Company.

In addition to this, we call attention to the fact that the general finding by the Court of Claims that the Norfolk-Hampton Roads Company treated this land "as though it belonged to" itself, does not, under our Virginia decisions, justify the conclusion that it was in actual adverse possession of the land. This was decided in *Taylor* v. *Burnsides*, 1 Gratt. (42 Va.) 165. We refer to our discussion on this point on pages 25 and 26 of our opening brief.

We shall, therefore, proceed on the assumption that the Court of Claims in its findings of fact specified *all* of the acts done by the Norfolk-Hampton Roads Company in its effort to obtain title to this land by adverse possession.

On pages 20 to 26 of our opening brief we have discussed each separate act done by this Company with reference to this land and we reached the conclusion that prior to the year 1907 these acts, all taken together, did not constitute actual adverse possession. We refer to the findings of the Court of Claims as tabulated by us on pages 8 and 9 of our opening brief, and to our discussion of same on pages 20 to 26 of the same brief. It is apparent from these findings that if the Norfolk-Hampton Roads Company was in actual adverse possession of this land prior to 1907 it was by virtue of the following three acts found by the Court of Claims:

> "(c) In the development of its said property, streets were opened and graded through the land of said Reserve;
>
> (d) timber was cut therefrom and used or marketed by the Company;

(e) and bulk-heads were built by the Company in front of the property to protect it from erosion by the waves and tides."

These are the only acts which the Court of Claims found said Company did on this land prior to the year 1907. And it follows that if said Company can be considered as having had actual possession of this land prior to 1907 it must be by virtue of these three acts. Our contention is that under the Virginia law these acts do not amount to actual possession. It must be borne in mind that under the decisions of the Virginia Court acts of ownership must be "open, notorious and *habitual*" before they can assume the proportions of actual possession.

The above specified acts certainly do not comply with this test.

The Court finds that streets were opened and graded through this land. But it fails to find when this work was commenced, how long it continued or the extent of the work itself.

The Court finds that timber was cut from the land and used or marketed by said Company. But it does not find when this cutting was commenced, the extent of it, whether timber was cut from the whole land or from only certain portions of it, or whether the cutting was *occasional* or *habitual.*

The Court finds that bulk-heads were built by the Company *in front* of this property to protect it from waves and tides. But it did not find when these bulk-heads were built, or how often they were put there, or anything else about them.

All of these matters are vital considerations, because the mere facts that some timber was cut at some time, that some streets were at some time opened on some portions of this property, that some bulk-heads were built at some time in front of this property—do not *per se* constitute *actual possession of the property.* In our opening brief, pages 15 to 24, we have referred to various Virginia and West Virginia cases deciding what constitutes actual possession, and mentioning various acts of ownership which are not sufficient for this purpose. In particular, we refer to those cases where it was decided that *occasional* cutting of timber on land was not sufficient; that asserting title to land and forbidding trespasses thereon were not sufficient; that fishing and hunting on a pond and renting boats to others for that purpose were not sufficient; that ranging cattle over lands, and cutting grass therefrom and hauling it away to be used as manure on other lands were not sufficient; that occasional acts of trespass, such as cutting trees, stripping bark, making surveys, tapping sugar trees, piling wood thereon, digging and selling sand therefrom were not sufficient.

Under Rule I (par. 2) of this Court relating to appeals from the Court of Claims, the findings of fact are in the nature of a *special verdict*, and should be sufficient in and of themselves to justify the conclusion of law.

In the case of *Ward* v. *Cochran*, 150 U. S. 597, this Court held that where a *special verdict* was rendered in an action of ejectment, that verdict must contain *all* the facts essential to entitle the claimant

by adverse possession, to a judgment. And the verdict was held to be insufficient to sustain the defendant's title by adverse possession, because it did not find that such possession was *actual* and *exclusive*. Justice Shiras, in delivering the opinion of the Court, cited with approval the case of *Jackson* v. *Berner*, 48 Ill. 203, where it was held that an adverse possession could not be made out by inference, but should be established by clear and positive proof. This case further decided that a special verdict could not be pieced out and the missing facts supplied by inference, or even by reference to other parts of the record.

In the case at Bar we contend that the *special verdict* (findings of fact) of the Court of Claims does not show that the appellee's possession was *actual*, and this missing fact cannot be supplied by inference.

In the case of *United States* v. *Ross*, 92 U. S. 281, this Court held that the Court of Claims was not authorized to conclude, as matter of law, in the absence of evidence, that certain property was delivered by a military officer to a treasury agent and sold by the latter and the proceeds converted into the treasury; that the presumption that public officers have done their duty does not supply proof of independent facts.

By the same token, we submit that this Court is not justified in assuming that the opening of streets, cutting of timber and building of bulk-heads were of such a character and continued for such a length of time as to amount to *actual* possession.

Bear in mind that prior to 1907 no portion of this land was inclosed, no portion of it was occupied by any one, no portion of it was in cultivation, but prac-

tically all of it was in forest growth, and there were no buildings or improvements of any kind on it.

Bear in mind also that, according to the findings of fact, the Norfolk-Hampton Roads Company knew that it had "no claim of right, title or interest in or to any part of said lots or land," and that it "*deliberately* set about trying to acquire title to said lots and land by adverse possession."

In these circumstances, it is no hardship on the Norfolk-Hampton Roads Company to require it to prove clearly every essential element necessary to adverse possession. It is not the case of an innocent purchaser, or of one misled by the silence of the true owner into thinking that certain land belonged to it; but here the Norfolk-Hampton Roads Company knew from the outset that it did not have any title to this land but that another party owned it, and, with these facts before it, it *deliberately* attempted to deprive the true owner of its land by adverse possession. We ask that the strict letter of the law be imposed.

Counsel for the plaintiff-appellee seems to think that this Court should supply the omissions in the findings of the Court of Claims and he cites two cases to which we will now refer.

In *United States* v. *Pugh*, 99 U. S. 265, which was an appeal from the Court of Claims, the ultimate fact to be determined was whether the proceeds of the sale of certain captured property belonging to the claimant had been paid into the treasury. No direct proof of that was given, but if it was shown at all it was by way of inference from certain circumstantial facts established by the evidence. These circum-

stantial facts were set forth in the findings of the Court of Claims upon which its judgment was rendered, and the question the Supreme Court was called upon to decide was whether or not these facts were sufficient to support the judgment.

Chief Justice Waite, in delivering the opinion of the Court, made this succinct statement:

> "The inquiry thus presented is as to the legal effect of facts proved, not of the evidence given to make the proof; and the question of practice to be settled is, whether, under our rule, the judgment of the Court of Claims as to the legal effect of what may, perhaps not improperly, be called the ultimate circumstantial facts in a case, is final and conclusive, or whether it may be brought here for review on appeal."

Further on in the opinion he said:

> "To avoid misapprehension in the future, we take this opportunity to say, that we not only think such a judgment may be reviewed here if the question is properly presented, but that when the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record."

(This sentence immediately precedes and explains the quotation made by the appellee on page 29 of its Brief.)

In the case of *United States* v. *Andrews*, 179 U. S. 96, cited by the appellee, the Court of Claims had made a finding that a certain trail, known as the Chisom trail, was an *established trail* en route from Texas to a market in Kansas. A judgment was rendered against the United States and on appeal to this Court the Government contended that the finding of the Court of Claims just referred to did not mean the trail was a *legal* trail or had been *legally* established. But this Court held that the finding by the Court of Claims that the trail was an *established* trail was equivalent to a finding that it was a *lawfully* established trail permitted by the laws of the United States. The gist of the decision is found in the following sentence: "An established trail, in this case, means a legally established trail, and we must presume the Court below so intended."

(The quotation from the opinion which appears on page 31 of the appellee's Brief stops just short of this sentence, which clearly explains the decision.)

From this it appears that this Court simply construed the language of the finding made by the Court of Claims. It has no bearing whatsoever on this case.

In the case at Bar, we are not asking this Court to construe the language used by the Court of Claims in its findings—the language is clear enough—but we are asking this Court to decide as a matter of law that the findings made do not justify the conclusion reached.

Status of Vue de L'Eau Company:

At various places in his brief counsel for the appellee refers to the fact that after 1874 the Vue de L'Eau

Company became dormant and remained "wrapped in slumber" until 1921, after the United States took title to and possession of the property. It is conceded by him and was expressly found as a fact by the Court of Claims that this Company was never dissolved, never surrendered its charter and is still a live corporation; that its legal existence was recognized by the Virginia Court on April 12, 1921, when it appointed the appellant its receiver.

We do not quite understand the relevancy of these repeated references by counsel to the dormancy of the Vue de L'Eau Company. It would seem that the learned counsel for the appellee seems to think that because the Vue de L'Eau Company was asleep the Norfolk-Hampton Roads Company was justified in taking its property. This contention cannot be sound. We have never before heard it contended that despoilation of a person was justified simply because he was asleep. A sleeping person is ordinarily entitled to more protection than one who is wide awake.

It is true that the Vue de L'Eau Company did, after its deed of assignment, become inactive, and so far as we know it ceased to function as an active corporation. Its officers and directors have been dead for a number of years, and the stock of the company, so far as we know, is held by their children and grandchildren. These considerations, however, have no bearing whatsoever on the question of title. It is conceded that the company is still in existence, and, under the laws of the State of Virginia, is a live cor-

poration capable of taking and holding title to land. It is also conceded that it is the true fee-simple owner of the land in controversy by virtue of title deeds, unless it has been deprived of this property by the adversary possession of the Norfolk-Hampton Roads Company.

The Norfolk-Hampton Roads Company stands at the Bar of this Court and admits that the Vue de L'Eau Company was the fee-simple owner of this tract of land, but that it, the Norfolk-Hampton Roads Company, subsequently became the owner by adverse possession. The burden of proof rests upon it to show clearly that it acquired title in this way. It must prove clearly all of the elements of adverse possession.

The fact that the Vue de L'Eau Company became inactive or dormant cannot have the effect of vesting title to its land in the Norfolk-Hampton Roads Company. Not only is this true, but the law considers that the Vue de L'Eau Company was in constructive possession of this land in virtue of its title deeds unless and until ousted by an actual adversary possession.

Says Judge Baldwin in *Taylor* v. *Burnsides*, 1 Gratt. (42 Va.) 165, 201: "There can be no ouster of the constructive possession of the older patentee, but by an *actual* adversary possession."

If the Norfolk-Hampton Roads Company was in actual adverse possession of this land for the statutory period of fifteen years before it was taken by the United States of America, then it acquired title thereto regardless of whether the Vue de L'Eau Company was active or dormant, its officers living or dead; but

if it was not in actual adverse possession of the land for the requisite period of time, then it did not acquire title thereto even if the Vue de L'Eau Company was dormant, and its officers and directors dead.

So we cannot understand how the question of the status of the Vue de L'Eau Company, its officers and directors can be injected into this case for the purpose of bolstering up the title claimed by the Norfolk-Hampton Roads Company.

Just why the stockholders of the Vue de L'Eau Company took no steps prior to April 12, 1921 (the date of the institution of the receivership suit), to assert a claim to this land, it is not material to inquire. Doubtless they knew nothing about it and were totally uninformed as to their rights. We do know that shortly after the United States of America took possession of this property the Board on Compensation for Site published an exhaustive report in which the title to this property was discussed at length.

This report was printed and given wide circulation throughout this entire community, and it is probable that the attention of some of the stockholders of the Vue de L'Eau Company, and the descendants of its incorporators, was called to this report, and that it gave them the first information they received as to the rights of the Vue de L'Eau Company to this land.

Of one thing, however, we are quite certain: The Norfolk-Hampton Roads Company cannot complain that it was misled or deceived in any way by the inactivity or dormancy of the Vue de L'Eau Company. When in the year 1899, it purchased some

adjoining property it learned of the existence of the "Prize Lot Reserve" and with full knowledge of who the true owner was, it set to work "*deliberately to acquire title to this property by adverse possession.*"

Under these circumstances surely this Court will scrutinize closely its actions and see to it that all of the elements of adversary possession are present before it will hold that the Norfolk-Hampton Roads Company deprived the true owner of its land.

No Claim of Right:

Counsel for the appellee concedes that a disseizor must have a "claim of right" before he can acquire title by adverse possession, but he says that this does not mean "*a rightful claim*" (Appellee's Brief 33).

We have never contended that a disseizor had to have a *rightful claim* before he could acquire title by adverse possession. If he had a *rightful claim* there would be no occasion to invoke adverse possession. But we do contend that under the Virginia decisions referred to on pages 27 to 31 of our opening brief, it is necessary for the claimant to have a bona fide claim of right or title. He must have a bona fide claim of some kind whether it is in fact valid or invalid.

As a matter of fact, in this case the Court of Claims has found that the Norfolk-Hampton Roads Company did not have any "*claim of right*, title or interest," to this land, and knew that it had no such claim. (Finding VII, R. 13, 14).

Counsel for the appellee seems to rely confidently on the case of *Virginia Midland R. R. Co.* v. *Barbour*,

97 Va. 118, to sustain his contention that a bona fide claim is not necessary. We do not think this case sustains his contention.

In that case a man by the name of Hicks purchased a lot of land in 1868. He became a bankrupt, and in 1878, his assignee in bankruptcy conveyed the lot to a railroad company. Hicks continued in possession of the lot and had it inclosed. The agent of the railroad company demanded possession of the lot, but Hicks told him that the lot belonged to him, and ordered him off the premises. He continued to live on the lot, cultivated it, paid taxes on it, and had it inclosed. It was decided that he had acquired good title by actual adverse possession. The court held that it was not necessary that the claim of title should be under a deed or other writing, but said: "But where it is a mere claim, that is, a mere assertion of a right, without any paper title, the adverse holding is limited to the actual inclosure of the claimant."

In other words, the court held that there must be some claim of right or title to the land, whether valid or not.

Judge Buchanan, in delivering the opinion of the Court, said that it clearly appeared from the evidence that Hicks "did claim the land as his own."

In the case at Bar the Norfolk-Hampton Roads Company never had any claim of right or title to this land. It simply attempted to acquire title by adverse possession.

Suppose, in the year 1906, a representative of the Vue de L'Eau Company had demanded of the Norfolk-Hampton Roads Company by what right or title it

was exercising acts of ownership on the land. There could have been only one truthful answer, "By no right or title whatsoever, but we are simply attempting to acquire title by adverse possession."

The Question of Damages:

In concluding his brief, counsel for the appellee asks this Court to affirm the judgment of the Court of Claims and to render a judgment against the appellant and the surety on its bond for damages and costs. He says that the damages awarded should be sufficient to cover the interest on the amount of the judgment "from the time the appeal was taken until the probable date when appropriation can be had and payment of the judgment made."

We sincerely hope that this question will not be reached in the deliberations of the Court, but that the Court will reverse the judgment of the Court of Claims and render a judgment in favor of the appellant against the United States for the sum of $33,000.00. But in the event this hope is not realized and the judgment of the Court of Claims is affirmed, it will then become necessary for the Court to consider this question of damage. A word on this subject from us may, therefore, not be amiss.

The appeal in this case was allowed by the Court of Claims on August 1, 1923 (R. 16). If this appeal had not been allowed or taken, the appellee would not have gotten its money from the United States until November, 1922, when it received payment for the land not in dispute (See Appellee's Brief 3, 4). There-

fore, interest on this money should not begin to run until November, 1922. It should cease to run on the date when this Court renders a final decision. Just as soon as a final decision is rendered by this Court in this case, the United States is free to pay the money to the person entitled thereto, and it can no longer be claimed that it was prevented by this appeal from doing so after that time.

CONCLUSION.

On the whole case we submit that the judgment of the Court of Claims should be reversed and that this Court should render a judgment in favor of the appellant against the United States for the sum of $33,000.00.

Respectfully submitted,

E. R. F. WELLS,
Attorney for Guaranty Title & Trust Corporation, Receiver of Vue de L'Eau Company, Appellant.

GUARANTY TITLE & TRUST CORPORATION, RECEIVER OF VUE DE L'EAU COMPANY, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 109. Argued November 14, 1923.—Decided February 18, 1924.

1. Under the Virginia Code, 1919, § 5805, providing that no person shall make an entry on, or bring action to recover, any land lying east of the Alleghany Mountains, but within 15 years next after the time when the right to do so first accrued to himself or to some person through whom he claims, adverse possession for the required period not only bars the owner's right of entry or action but vests title in the disseisor. P. 204.
2. The disseisor need not have a deed or writing giving color of title or furnishing foundation for belief or claim of ownership or legal right to enter and take possession; his intention to appropriate and use the land as his own to the exclusion of all others suffices. *Id.*
3. Acts sufficient to apprise everyone of exclusive occupation and use, with unequivocal, emphatic and public assertion of ownership, *held* to have met the requirements of the Virginia law governing title by adverse possession. P. 205.
4. Where one of two rival claimants in the Court of Claims was rightly awarded the judgment, but payment of the money subsequently appropriated by Congress was withheld because of an appeal taken by the other in which the former intervened as appellee, this Court, in affirming the judgment, required the appellant to pay the successful claimant costs and interest on the judgment from the date of the appropriation until funds should be

available for payment of the judgment by the United States. P. 206.

57 Ct. Clms. 620, affirmed.

APPEAL from a judgment of the Court of Claims awarding recovery, for land taken by the United States, to one of two rival claimants of the title. The defeated claimant, Guaranty Title & Trust Corporation, as receiver, which had intervened in the Court of Claims, took the appeal. The other claimant, Norfolk-Hampton Roads Company, original plaintiff, was permitted to intervene here as an appellee.

Mr. E. R. F. Wells for appellant.

Mr. H. H. Rumble for Norfolk-Hampton Roads Company, appellee.

Mr. Solicitor General Beck and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, filed a brief on behalf of the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In 1873, the Vue de L'Eau Company, a Virginia corporation, owned a tract of about 294 acres at Hampton Roads, Virginia. It platted the "Prize Lot Reserve" (hereinafter called the "Reserve"), containing 4.55 acres, into lots and streets. In January, 1874, after having sold seven of these lots, it made an assignment for the benefit of its creditors and conveyed to trustees all of its land except the Reserve. Then the company became dormant. No organization was kept up. It had no directors or officers. But there was no formal dissolution or surrender of the charter. Thereafter, no action was taken by or in behalf of the company in reference to this land. It was allowed to remain in its former condition and to develop forest growth.

The Court of Claims found that in 1899 the Norfolk-Hampton Roads Company purchased a large acreage of land, including that immediately surrounding the Reserve, and, in the language of the findings of fact, ". . . upon purchasing said lands the plaintiff company, [Norfolk-Hampton Roads Company] without any right, title or interest, or claim of right, title or interest, in or to the lots or land of said Prize Lot Reserve, and with full knowledge of the fact that it had no claim of right, title or interest in or to any part of said lots or land, deliberately set about trying to acquire title to said lots and land by adverse possession; and in the course of its efforts to so acquire title thereto, the following action was taken: The plaintiff company . . . took possession of said holdings and from thenceforward to the time of its taking by the Government in June, 1917, treated the land of said Reserve as though it belonged to the plaintiff company. It recorded plats of its said property in which the land of said Reserve was included and indicated as a part of the company's holdings. The company's advertising matter issued in 1899 indicated as belonging to the company lands which included the lands of said Reserve, and said land was included in the company's subdivision known as 'Subdivision No. 1, Norfolk on the Roads,' a plat of which, stating said subdivision to be the 'Property of Norfolk-Hampton Roads Company,' was recorded in the County Clerk's office on June 14, 1901. In the development of its said property, streets were opened and graded through the land of said Reserve; timber was cut therefrom and used or marketed by the company; and bulkheads were built by the company in front of the property to protect it from erosion by the waves and tides. Said company also leased an area of its lands to the Jamestown Exposition Company, in 1907, including therewith said Prize Lot Reserve land as belonging to plaintiff company, and thereafter, upon the termination of the Exposition Company's lease,

said lands were leased by plaintiff company to another tenant, by whom they were occupied for some time. And in general, the land of said Reserve was held out and treated by plaintiff company as being the property of said company. It does not satisfactorily appear who, if anyone, paid the taxes on said land between the years 1874 and 1917."

June 28, 1917, the United States, pursuant to an Act of Congress of June 15, 1917, 40 Stat. 207, took 9.22 acres of land fronting on Hampton Roads for a naval base, made up of the Reserve and 4.67 acres immediately surrounding it. At that time the Norfolk-Hampton Roads Company was in possession of the tract taken. The compensation fixed by the President, $37,000, was not satisfactory. Payment of 75 per cent., as provided by the act, was not made because there was a question as to the title to the Reserve. The company sued the United States in the Court of Claims. 40 Stat. 207, 208; Judicial Code, § 145. Thereafter, in a suit brought in the Circuit Court of the City of Norfolk, Virginia, against the Vue de L'Eau Company by one of its stockholders, the Guaranty Title & Trust Corporation was appointed receiver of the company to take charge of its property and to prosecute claims and suits for the protection of its rights and interests. The receiver intervened in this case in the Court of Claims, alleging that the Vue de L'Eau Company was the owner of the Reserve at the time of the taking, and that it is entitled to compensation therefor. The Court of Claims found that, at the time of the taking, that part of the tract, title to which is not in controversy, was worth $35,500, and that the Reserve, claimed by both parties, was worth $33,000, and gave judgment in favor of the Norfolk-Hampton Roads Company for the whole $68,500. The receiver appealed. September 22, 1922, Congress made appropriation for the payment of this judg-

ment. 42 Stat. 1052. The amount fixed as compensation for the land not claimed by appellant was paid. Because of the claim of appellant, the United States withholds payment of the balance until the determination of this appeal. June 4, 1923, this Court granted leave to the Norfolk-Hampton Roads Company to intervene as party appellee, and required appellant to give bond " . . . to secure the payment of costs of the appeal as well as interest on $33,000 . . ." [262 U. S. 733.]

The owner at the time of the taking is entitled to the balance remaining unpaid. The question for decision is whether the Vue de L'Eau Company or the Norfolk-Hampton Roads Company was then the owner of the Reserve.

A Virginia statute provides that, " No person shall make an entry on, or bring an action to recover, any land lying east of the Alleghany mountains, but within fifteen years . . . next after the time at which the right to make such entry or bring such action shall have first accrued to himself or to some person through whom he claims. . . ." Code of 1919, §5805. By adverse possession and lapse of time the owner's right of entry or action is barred, and title is acquired by the occupant. *Cochran* v. *Hiden*, 130 Va. 123, 142; *Virginia Midland R. R. Co.* v. *Barbour*, 97 Va. 118, 123; *Creekmur* v. *Creekmur*, 75 Va. 430, 435, 439; *Thomas* v. *Jones*, 28 Gratt. 383, 387; *Middleton* v. *Johns*, 4 Gratt. 129.

The disseisor need not have a deed or other writing giving color of title or furnishing foundation for belief or claim of ownership or legal right to enter or take possession of land. Sometimes misapprehension arises from the somewhat misleading, if not inaccurate terms frequently used, such as " claim of right," " claim of title," and " claim of ownership." " These terms, when used in this connection, mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the

exclusion of all others." *Carpenter* v. *Coles,* 75 Minn. 9, 11. On the facts found, it is clear that the necessary adverse intent of the Norfolk-Hampton Roads Company existed from 1899 to the time of the taking. *Cochran* v. *Hiden, supra; Brock* v. *Bear,* 100 Va. 562, 565; *Haney* v. *Breeden, id.* 781, 784; *Virginia Midland R. R. Co.* v. *Barbour, supra,* 122; *Kincheloe* v. *Tracewells,* 11 Gratt. 587, 605. See also *Chicago & Northwestern Ry. Co.* v. *Groh,* 85 Wis. 641, 645; *Rennert* v. *Shirk,* 163 Ind. 542, 545, 546.

The Reserve was inclosed on all its sides, excepting the waterfront, by land acquired by the Norfolk-Hampton Roads Company in 1899. In that year, it issued advertising matter indicating the land as belonging to it. It included the Reserve and asserted ownership of it in a plat filed in 1901. It did not leave the land in a state of nature, but changed and improved it. It opened and graded streets, cut and removed timber for its own use and for sale, protected the waterfront by construction of bulkheads, and leased it to others. It platted, occupied and treated the Reserve just as it did surrounding land which it purchased. Its acts were sufficient to apprise everyone of its exclusive occupation and use. Its assertion of ownership was unequivocal, emphatic and public. The findings show that the possession met all the requirements of law under the decisions of the Supreme Court of Appeals of Virginia. *Kincheloe* v. *Tracewells, supra,* 602; *Creekmur* v. *Creekmur, supra,* 434; *Virginia Midland R. R. Co.* v. *Barbour, supra.* See also *Taylor* v. *Burnsides,* 1 Gratt. 165, 192, 198, 201; *Harman* v. *Ratliff,* 93 Va. 249, 253; *Whealton* v. *Doughty,* 112 Va. 649, 656; *Craig-Giles Iron Co.* v. *Wickline,* 126 Va. 223, 232. And the facts make out adverse possession under the rule generally applied.[1]

[1] *Alice State Bank* v. *Houston Pasture Co.,* 247 U. S. 240; *Ellicott* v. *Pearl,* 10 Pet. 412, 442; *Ewing* v. *Burnet,* 11 Pet. 41, 52; *Zeilin* v. *Rogers,* 21 Fed. 103, 108; *Plume* v. *Seward,* 4 Cal. 94; *Costello* v. *Edson,* 44 Minn. 135, 138; *Lyons* v. *Fairmont Co.,* 71 W. Va. 754, 768;

The judgment is affirmed. In addition to costs of this appeal, the Norfolk-Hampton Roads Company is entitled to interest to be paid by appellant on $33,000 since September 22, 1922, until funds are available for payment by the United States of the balance of the judgment.

Judgment affirmed.